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No. 18664

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MONOLITH PORTLAND CEMENT COMPANY, a corporation,

Appellant,

vs.

DOUGLAS OIL CO. OF CALIFORNIA, a corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

Statement Showing Jurisdiction and Summarizing Prior Proceedings.

This is the second appeal in an action tried to the Court without a jury, in which jurisdiction is founded on diversity of citizenship and an amount in controversy exceeding the sum of $10,000.00, exclusive of interest and costs. 28 U. S. C. §1332. Plaintiff is a California corporation and defendant is a Nevada corporation [R. 3]*, and the parties are, for diversity purposes, citizens of such different States.

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*"R." is used herein to designate the printed Transcript of Record on the first appeal (No. 17036 on the records of this Court). "Clk. Tr." and "Rep. Tr." are used herein to designate, respectively, the Clerk's Transcript of Record and the Reporter's Transcript of Proceedings after remand. The three Reporter's Transcripts of the August 13, 1962, October 15, 1962 and Jan-

Appellee oil producer seeks damages for breach of a fuel oil sales contract under California law. On the first appeal from a judgment for Douglas holding Monolith liable for breach, and fixing damages at $133,825.66, *Monolith Portland Cement Co. v. Douglas Oil Co. of Cal.,* 303 F. 2d 176 (1962) this Court at first approved both liability and damages (Opinion of January 18, 1962). Later, while denying Monolith's petition for rehearing, the Court amended its first opinion, reversed the judgment of the District Court for adopting an erroneous measure of damages, and remanded for "proceedings consistent with this opinion." (Order of May 16, 1962).

Summary Statement of the Case.

In this Court's view, the crux of the District Court's error was its allotment of "too much of the breaches to the last three months" of the contract term (303 F. 2d 176, 181). "This was important because generally during the term of the contract the price steadily declined downward." (*id.* p. 181.) This Court stated the correct quantities of monthly defaults, and reversed, observing that: (*id.* p. 182)

> "If the trial court deems it better to reopen the case to receive further evidence to enable it to make its computation of the damages within this court's view of the law, it should feel free to do so. Obviously, the scope of such inquiry would be rather limited."

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uary 2, 1963, although bound together as Volume 2 of the Transcript of Record, are separately paged. "No. 17036 Clk. Tr." is used to designate unprinted portions of the record on the first appeal. The numbers following such designations indicate pages in those records.

On remand, the mandate was filed, and Monolith moved the Court to re-open the case so as to receive evidence of oil sales and Douglas' benefit of relief from return performance. [Clk. Tr. pp. 2, 13 *et seq.*] The District Court found that there was *no* evidence of oil sales in two of the months specified (October and November, 1957), and therefore re-opened the proceedings "for the limited purpose solely of taking evidence of sales of fuel oil during the months of October and November, 1957." [Clk. Tr. p. 56]. However, the District Court concurrently ruled that "Evidence of sales at times other than the above was developed at the trial" and hence denied Monolith's motion for leave to produce additional evidence of oil sales in such months by *subpoena duces tecum* and offer it, and set the matter "for trial" [Clk. Tr. p. 56]. Thereafter the "trial" was continued [Clk. Tr. p. 57].

At the "trial", on October 15, 1962, Monolith offered evidence of substantial oil sales in October and November, 1957, most of which were at or near the Standard Oil "posted price" of $2.95/bbl—materially higher than those contended for by Douglas, and again moved for an opportunity to obtain and offer similar evidence as to the other months in question. The motion was denied summarily. [Rep. Tr. October 15, 1962 Hearing, p. 4]. Monolith then offered to prove (if it were given the process of the Court) that the evidence of oil sales already in the record was not representative and that a significant and material change in "market value" for such months would result if the available evidence were obtained by deposition, admitted and weighed with the prior evidence (*e.g.* if

the District Court's original weighted average formula [R. 77] were applied) [Rep. Tr. October 15, 1962 Hearing, pp. 26-27]. This offer was refused.

Thereafter, on November 8, 1962, the District Court issued its "Opinion on Revision of Judgment," designating such Opinion as its Findings of Fact and Conclusions of Law [Clk. Tr. p. 85]. In such Opinion, the District Court "found" "market value"(s) for the months after October-November, 1957, at levels significantly below those which would have resulted from the admission and weighing of the excluded offer of proof. For example, Monolith offered to prove that the giant Standard Oil Company sold oil at or near the "posted price". In December this was $2.95/bbl. [Ex. 54]. However, the Court found a December, 1957, "market value" of $2.50/bbl. [Clk. Tr. p. 86]. So, too, the $2.95/bbl. "posted price" changed on January 10, 1958, to $2.75/bbl.—but the District Court found a January, 1958 "market value" of $2.10/bbl., or 65¢-85¢/bbl. below the "posted price" [Clk. Tr. p. 86].

The District Court also "interpreted" this Court's mandate of reversal [Clk. Tr. p. 2], which did not mention interest, to mean that this Court meant the reversal of the prior judgment to be a mere "modification" [Clk. Tr. p. 88]; and, purporting to follow "federal law," directed the preparation of a "revised" judgment in accordance therewith, allowing interest on the major portion of such judgment from the date of the original

April 20, 1960 judgment; thus, in practical effect, reinstating the original judgment—which this Court had reversed.

Such a "Revised Judgment" was entered over Monolith's objection [Clk. Tr. p. 119], and Monolith's Motion for New Trial, etc., [Clk. Tr. p. 122], was denied [Clk. Tr. p. 140]. This appeal followed.

The present posture of the case is that by the exclusion of relevant material evidence of substantial oil sales at prices much higher than the market values found, and by the retroactive imposition of pre-judgment interest, the District Court succeeded in reaching a new judgment [Clk. Tr. p. 140], in approximately the same amount as the original, reversed judgment [R. 94].

The District Court was candid in stating that he still did not agree with this Court's view of the law [Rep. Tr. of January 3, 1963], and that the new judgment was structured in accordance with his view of the equities of the situation, since he had doubt that the result was legally correct [Clk. Tr. of January 3, 1963, p. 12].

The basic questions presented by this appeal are whether the District Court correctly followed the mandate and whether Monolith was denied a fair hearing below under this Court's view of the law.

The more detailed facts pertinent to each of the points urged on this appeal are set out in connection with the argument thereof.

Specification of Errors.

1. The District Court erred in exceeding the mandate by interpreting the "reversal" as a "modification" in order to justify awarding pre-judgment interest;
2. The District Court erred in awarding pre-judgment interest after reversal, contrary to California law;
3. The District Court erred in excluding available, material evidence of oil sales and Douglas' relief from return performance [Clk. Tr. pp. 35-37, 56, 85-86; 127-131];
4. The District Court erred in denying Monolith a fair hearing on remand;
5. The District Court's findings of fact of market value and contract price in its Opinion are clearly erroneous in that they are unsupported by the evidence;
6. The District Court's exclusion of evidence, grant of prejudgment interest, and making of findings regarding market value and contract price all proceed from an erroneous view of the law and of the scope of the Court's duty under the mandate;
7. The District Court erred in refusing to reconsider the question of mitigation of damages.

It is not possible to completely and literally comply with Rule 18(2)(d) which requires that "the full substance of the evidence . . . rejected" shall be quoted, since the "evidence rejected" was in the form of an offer of proof. Such offer of proof is, however, as follows [Rep. Tr. of October 15, 1963, p. 26, line 19, to p. 27, line 13]:

"Mr. Elliott: Your Honor, we are just about to close here now, and on reflection I am still a little bit shaky, but I wanted to be sure, and I think I am sure in my own mind, but I am not sufficiently clear as to whether the record reflects it, that my informal request, so to speak at the commencement of the hearing today for the Court to reconsider was in effect an offer of proof as to what we could establish were we allowed to obtain subpoenas duces tecum and take the depositions of these informed persons in the industry at Bakersfield for those gap months, and I wanted to be sure that the Court did understand that, because I can't make a formal offer of proof because they won't talk to me without a subpoena, and I can't get a subpoena without the Court's order that that discovery material is relevant and material. But the thrust of my request of the Court would be that were I allowed to pursue discovery and obtain the depositions, the evidence would show, I believe, that sales of the great majority of oil were sold at substantially above the prices which are now reflected in our present record. That would be the sense of the motion on the request for reconsideration."

Summary of Argument.

I.

This Court's mandate, reversing the original judgment below, makes no mention of pre-judgment interest. The District Court's "interpretation" of such "reversal" as a "modification", in order to justify pre-judgment interest from the date of the original, reversed

judgment, exceeded the mandate and constituted fundamental error. The award of such pre-judgment interest is contrary to: (1) *Briggs v. Pennsylvania R.R. Co.,* 334 U. S. 304; (2) The applicable statute—28 U. S. C. §1961; (3) California law (both statutory and cases); (4) Douglas' waiver of the point and failure to raise such point on the first appeal.

II.

The District Court's exclusion of proffered, material evidence of oil sales at prices higher than the Court found the market value of such oil to be was: (1) Based upon a misconstruction of this Court's mandate; (2) Was a denial of due process; (3) Was an abuse of discretion—to the extent the Court had discretion. The District Court did not agree with this Court's view of the law of damages, and therefore applied "equitable" principles to arrive at substantially the same judgment as the original reversed judgment.

III.

The District Court's conclusion, following the first trial, that Douglas' admitted failure to resell oil in the period October-May as it accumulated under the contract was irrelevant to Monolith's defense of non-mitigation, was premised on the District Court's view of when the oil fell due—which this Court reversed and disapproved. The District Court's refusal to reconsider the issue of non-mitigation, after such reversal, was clearly erroneous.

ARGUMENT.

I.

This Court's Mandate Reversing the Original Judgment Below Makes No Mention of Pre-Judgment Interest. The District Court's "Interpretation" of Such "Reversal" as a "Modification" in Order to Justify Pre-Judgment Interest From the Date of the Original Reversed Judgment, Exceeded the Mandate and Constituted Fundamental Error.

A. Preliminary Statement.

The District Court's original, April 20, 1960, judgment for $133,825.66 [R. 94], proceeded from its findings of "market value" and "contract price" on March 10, 1958, and during the months of April and May, 1958 [R. 92-93], which the District Court had concluded (pursuant to Cal. Civ. Code §1784(3)) were the times at which the unaccepted 154,266 barrel balance of the 200,000 barrel contract term minimum "ought to have been accepted" [R. 76].

This Court reversed, holding that "the key to the correct measure of damages" was a table of Monolith's monthly obligation to accept oil prepared by Douglas "early in the cause" [R. 21], and that the District Court had thus "allotted too much of the breaches to the last three months" (303 F. 2d 176, 181-182). This Court directed the District Court to re-examine the question of damages, and thereafter, "to make its computation of damages within this Court's view of the law" (301 F. 2d 176, 182).

Despite the unqualified reversal by this Court, which rendered its original determination *functus officio,* on

remand the District Court undertook to "interpret the Court of Appeals' mandate as a modification and not as a reversal as to a portion of the judgment" [Clk. Tr. p. 88], and, concluding that this Court "did not intend to disturb the judgment as to the 90,000 gallons [barrels] which were in default for the months of March, April and May . . ." allowed pre-judgment interest on the amounts found due in such "Opinion on Revision of Judgment" for the months of March, April and May, 1958, from April 20, 1960—the date of the original, reversed judgment [Clk. Tr. pp. 88-89]. The District Court also concluded that the proceedings directed by this Court's mandate language: "reversed . . . and remanded . . . for proceedings consistent with the opinion . . ." should be called proceedings "on revision" of the original judgment and not "remand" proceedings or "new trial" proceedings, and directed the preparation of a "revised judgment".

B. The District Court Exceeded Its Power When It Purported to "Interpret" the Mandate so as to Add Pre-Judgment Interest.

The District Court's actions on remand were erroneous in many respects (which we will discuss hereafter), but one basic error committed by the Court was the assumption that it had the power to consider the question of adding something to the mandate by a process of "interpreting" this Court's mandate.

Whatever the rule may have been prior thereto, ever since *Briggs v. Pennsylvania R. Co.*, 2 Cir. 1948, 164 F. 2d 21, 1 A. L. R. 2d 475, affirmed 334 U. S. 304, 68 S. Ct. 1039, 92 L. Ed. 1403, it has been settled that a district court lacks the power to add pre-judg-

ment interest to its new judgment following a reversal and remand from an appellate court, where the mandate is silent as to interest, regardless of a party's substantive right thereto.

In *Briggs,* the Supreme Court decided that (334 U. S. 304, 306):

> ". . . It is clear that the interest was in excess of the terms of the mandate and hence was wrongly included in the District Court's judgment and rightly stricken out by the Circuit Court of Appeals. The latter court's mandate made no provision for such interest and the trial court had no power to enter judgment for an amount different than directed. If any enlargement of that amount were possible, it could be done only by amendment of the mandate. . . ."

Therefore, the District Court here was completely without power to retroactively add pre-judgment interest to the new judgment it made and entered after remand, and its action in so doing must be reversed and set aside, on the authority of *Briggs.*

In *United States v. Hougham,* 364 U. S. 310, 5 L. Ed. 8 (1960), the Supreme Court reversed this Court's affirmance of Judge Jertberg's original October 18, 1957, judgment for $8,000 plus interest (270 F. 2d 290), and directed the District Court to enter judgment for the United States under §26(b)(2) of the Surplus Property Act (364 U. S. 318). The Supreme Court's mandate was silent as to interest. On remand, the District Court denied the plaintiff's claim to interest on the $151,025.32 (resulting from the

application of §26(b)(2)) from the date of entry of the original judgment). On appeal, this Court affirmed the propriety of such ruling, resting its decision, not on a construction of the Supreme Court's silent mandate as precluding such pre-judgment interest *a la Briggs,** but upon the ground that (301 F. 2d 133, 135):

> "This court must determine what meaning it gives to Section 1961, under the facts here presented. We hold the district court correctly applied Section 1961.
>
> "That post-judgment interest should be calculated from the date of the entry of the judgment in which the money damages, upon which interest is to be computed, were in fact awarded, does not do violence to the language of the statute. . . ."

As this Court observed in *Hougham,* the Court of Appeals, by framing its mandates appropriately, can make allowance for equitable precepts "when justice requires"; but that when the mandate is silent as to interest, the District Court lacks such equitable power and should deny such a claim.

Here, the mandate was silent as to interest, for in this Court Douglas sought neither the award of the pre-judgment interest the District Court had originally and properly denied in accordance with California law [R. 77], nor interest from the date of the

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*We recognize, as did the Court in *Hougham* that the composition of the Supreme Court has changed since *Briggs.* But unless and until the Supreme Court overrules the *Briggs* rule, it is the law of the land.

original, vacated judgment. Nor did Douglas move this Court to recall and amend its silent mandate. It was not until many months later, in the remand proceedings below, that Douglas expanded its theory of damages to include pre-judgment interest on any new judgment from the date of the original, April 20, 1960, reversed judgment.

In any event, whatever the conflict between the Circuits may be as to the proper interpretation of 28 U. S. C. §1961 still remaining after *Briggs**, the silence of the mandate in this case as to interest absolutely precluded the power to add pre-judgment interest the District Court assumed to exercise here.

Here the question is not whether a jury verdict denied life by a judgment *NOV*, but revitalized by the Court of Appeals should be given legal life from its entry.

Instead, the question is whether a judgment of the District Court itself, reversed for substantial legal error in determining damages, retains such "certainty" as to damages under California law as to support the award of interest from the date thereof when the mandate reversing it is silent? Plainly, it does not.

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*Appellant submits that there is no conflict between the circuits as to the lack of power of a district judge to add pre-judgment interest to the judgment following remand where the mandate is silent. *Briggs* laid this vexing threshhold question to rest, and the four dissenting Justices did not disagree. Their dissent was directed only to the proper interpretation of 28

It should be noted that the distinction relied upon by the dissent in *Briggs* between the interest provided by state statute to attach as a matter of law, and the interest awarded at a federal court's discretion as damages for delay, etc., is not involved here. The California constitution and statutes (and decisions construing them) provide that while a money judgment bears interest from the date of its entry, where a judgment is reversed for excessive damages, there can be no recovery of interest from the date of entry of the first judgment, since the amount of the second judgment is not ascertainable or "certain" until the matter is determined following remand. California Constitution, Article XX, §22; Deerings General Laws, Act 3757, §1; California Civil Code §3287; *Beeler v. American Trust Co.,* 28 Cal. 2d 435, 170 P. 2d 439 (original judgment as rendered and modified on appeal provided expressly for interest from its entry); *Lockhart v. McDougall Co.,* 190 Cal. 308, 212 Pac. 1; *Morris v. Standard Oil Co.,* 192 Cal. 343, 219 Pac. 998; *Bellflower City School District v. Skaggs,* 52 Cal. 2d 278, 339 P. 2d 848; *Niles Sand, Gravel & Rock Co. v. Muier,* 55 Cal. App. 539, 203 Pac. 1009 (money judgment reversed on appeal); *California Cowdery v. London, etc., Bank,* 139 Cal. 298, 303, 73 Pac. 196; *Barnham v. Edwards,* 128 Cal. 572, 574, 61 Pac. 176.

U.S.C. §811 (now §1961) when an appropriate application is made to the appellate court for pre-judgment interest in accordance with state law, which they taxed the majority with avoiding.

C. The Statutory Authority for the Allowance of Interest in Federal Civil Actions—28 USC §1961—Authorizes Interest Only From the "Entry" of the Final Judgment and Not Before. Unless Douglas Had an Independent, Substantive Right to Pre-Judgment Interest, the Allowance of Such Interest Hence Violated the Statute.

The federal interest statute—28 U. S. C. §1961* —has recently been construed by this Court contrary to the construction the District Court gave such statute.

In *United States v. Hougham,* 301 F. 2d 133 (1961) this Court held that unless the court of appeals tempers its mandate to specifically allow for pre-judgment interest, such interest is not allowable, stating (301 F. 2d 133, 135):

> ". . . This still allows for certainty of meaning in the statute. Whenever the district court is to apply the statute, it can do so with certainty; if the statute is not to be applied, the court of appeals can expressly so order in its mandate."

In ordinary cases where this Court reverses the District Court, the same result (denial of interest) is also required by the Court's Rule 24, providing for interest only when the judgment below is affirmed, or the appeal frivolous.

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*"Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgment recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by State law." June 25, 1948, c. 646, 62 Stat. 957.

Therefore, unless Douglas had a substantive right to pre-judgment interest under California law, the District Court's allowance of such interest was erroneous, under 28 U. S. C. §1961.

D. The Question of a Party's Substantive Right to Pre-Judgment Interest in a Diversity Case Is Controlled by State Law. Under California Law, Which Applies Here, Douglas Had No Substantive Right to Pre-Judgment Interest.

1. The question of a party's right to pre-judgment interest in a diversity case is controlled by state law. Even prior to *Erie v. Tompkins,* 304 U. S. 64 (1938) it was well-established that the question of interest prior to judgment is always one of local law, particularly in a diversity case. *Massachusetts Benefit Association v. Miles,* 137 U. S. 689, 691, 34 L. Ed. 834 (1891); *Klaxon Co. v. Stentor Electric Mfg. Co.,* 313 U. S. 487, 85 L. Ed. 1477 (1941).

Such rule was based on the fact that ever since 1842 when Congress first so provided (5 Stat. at L. 516, 518) in order "to bring about uniformity" between "federal law" and "state law" *Washington & G. R. R. Co. v. Harmon,* 147 U. S. 571, 37 L. Ed. 284 (1893), the current federal interest statute* has been construed as requiring the application of state law.

This one hundred year old rule was further reaffirmed by the Rules of Decision Act (28 U. S. C. §1652) providing for state law, and the unanimity of all the circuits in applying the state law of interest.**

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*Now 28 U. S. C. §1961.

**_Hobart v. O'Brien,_ 243 F. 2d 735, 1 Cir., 1957, cert. den., 355 U. S. 830;

Thus, before the District Court here decided that "federal law controls" the question of pre-judgment interest [Clk. Tr. p. 87], the long-settled practice of deciding questions of interest in diversity cases by state law was unassailable.

The District Court, we respectfully submit, in relying upon a supposed "federal law", was in error.

2. Plaintiff Had No Right to Pre-Judgment Interest Under California Law.

Before discussing the precise question of interest involved here, we emphasize that there never has been a serious contention that Douglas was entitled to pre-judgment interest—or interest as damages—from the time of the alleged breach of contract to the date of judgment.

Aetna Cas. & Sur. Co. v. B.B.B. Const. Corp., 173 F. 2d 307, 2 Cir., 1949 *cert. den.* 337 U. S. 917;

Stentor Elec. Mfg. Co. v. Klaxon Co., 30 F. Supp. 425, aff'd 115 F. 2d 268, 3 Cir., 1940, rev'd on another ground, 313 U. S. 487 (1941);

Chesapeake & Ohio Ry. Co. v. Elk, 186 F. 2d 30, 4 Cir., 1950;

Herd v. Krawill Mach. Corp., 256 F. 2d 946, 4 Cir., 1958, aff'd. 359 U. S. 297 (1959);

Midstates Oil Corp. v. Walker, 207 F. 2d 127, 5 Cir., 1953;

Grand Trunk Western R. Co. v. H. W. Nelson Co., 116 F. 2d 823, 841, 6 Cir., 1941;

Norfolk & W. Ry. Co. v. Board of Education, 114 F. 2d 59, 7 Cir., 1940;

Western Auto Supply Co. v. Sullivan, 210 F. 2d 36, 44, 8 Cir., 1954;

Aetna Ins. Co. v. Barnett Bros. Inc., 289 F. 2d 30, 9 Cir., 1961;

Bank of China v. Wells Fargo Bank, 209 F. 2d 467, 9 Cir., 1953;

Wunderlich Contracting Co. v. United States, 240 F. 2d 201, 206, 10 Cir., 1957.

By California statute, interest is allowable as additional damages for breach of contract only when the principal damages are "certain or are capable of being made certain" by mere computation, *California Civil Code,* §3287. Since by Douglas' own admission the "market price" "declined rapidly" during the contract term [R. 37], it followed that damages, if any, could be fixed only by judgment and not by computation—thus precluding pre-judgment interest.

Douglas never seriously contended that it was entitled to pre-judgment interest on the original trial. Indeed, its amended complaint [R. 8-15], upon which issue was finally joined, expressly acknowledged the statutory limitation of §3287, California Civil Code, by praying for damages "plus interest at the legal rate upon said sum or portions thereof from the date that the same *shall be determined to have become certain.*" [R. 14-15]. (Italics ours.) The amended Pre-Trial Conference Order did not specify the question of interest as an issue of either fact or law [R. 5-8]. However, in its Trial Memorandum, Douglas first asserted a right to interest "on the amount found to be due", asserting that from July 23, 1958, when it had filed its Supplemental Complaint [No. 17036, Clk. Tr. pp. 54-55], its damages were "certain or capable of being made certain by calculation" [No. 17036, Clk. Tr. pp. 231-232]. However, Monolith pointed out to the Court that in California pre-judgment interest was allowable for breach of a sales contract only if the "market price" element of the statutory formula (Cal. Civ. Code §1784(3)) was "well-established", and that when damages had to be judicially computed by averaging sales

(as here), "interest prior to judgment is not allowable," *Lineman v. Schmidt,* 32 Cal. 2d 204, 195 P. 2d 408 (1948). [No. 17036, Clk. Tr. p. 300]. In its "Memorandum" Opinion, the District Court found as a fact that there was no "well established market price" and hence disallowed pre-judgment interest [R. 77]. The original formal Findings, Conclusions and Judgment (drawn by Douglas), reflected such disallowance of pre-judgment interest, and the factual basis therefor [R. 93-94]. Douglas neither appealed from this adverse determination (involving over $19,000 at that time), nor referred to such finding and conclusion in its Appellee's Brief on the first appeal.

On remand, the District Court, while conceding that plaintiff had no substantive right to pre-judgment interest originally, apparently reasoned that so much of its original findings as were not explicitly disapproved in this Court's Opinon retained their vitalty as the predicate for starting interest running. We shall discuss the cases the District Court relied upon (involving mandates for directed dollar judgments) at a later point (pp. 29-33), and point out that under California law, when the appellate court's mandate "reverses" the original judgment and remands for further proceedings (*e.g.* taking of evidence, if indicated), the original judgment becomes a nullity—even if later republished in whole or in part.

As the California Supreme Court pointed out in *Cowdery v. London, etc., Bank,* 139 Cal. 298, 301, 73 Pac. 196:

> ". . . 'The legal effect of the order of the Supreme Court was to reverse and vacate the judg-

ment, and not merely to modify it. Upon a decision of the Supreme Court that there was material error in the action of the court below, that court may direct the character of the subsequent proceedings in the lower court, and its mandate will vary according to its views as to the proper course to be pursued. It may conclude not to reverse the judgment, but to modify it by eliminating some portion, or by adding something to it, leaving the remaining part of the judgment below to stand affirmed and in full force and effect from the date of its original entry or rendition; or it may reverse the judgment, which means to entirely vacate it, and may remand the cause for a new trial; or, if a new trial is not necessary, it may, upon the reversal, remand it with directions to the lower court to enter a particular judgment. To reverse is "to overthrow; set aside; make void; annul; repeal; revoke, as, to reverse a judgment, sentence, or decree" (Cent. Dic.); or, "to change to the contrary, or to a former condition" (Standard Dic.). * * * The distinction between a reversal of a judgment and an affirmance, with a modification, is too marked and radical to justify us in disregarding it. The decision of this court as to the form of its judgment or mandate, and as to what shall be the future proceedings in the court below, is a part of its duty generally, and particularly under section 957, of the Code Civ. Proc.,

and as such it is presumed to have received the same consideration as any other feature in the case. We are bound to assume that this court in this case acted advisedly and deliberately, and had good reason for ordering a reversal rather than a modification and affirmance. The part of the order directing the entry of a new judgment related solely to the proceedings after the reversal and the return of the case to the court below, and was not intended to, nor could it, change the reversal to a mere modification. Neither can the fact that it may now appear to us that the same result could have been reached by a modification justify this court in now changing the effect of the mandate.'. . ."

So, too, in *Morris v. Standard Oil Company,* 192 Cal. 342, 219 Pac. 998 (1923) where the court affirmed defendant's liability and merely directed that the question of damages be redetermined, and judgment entered for plaintiff, stating:

". . . It is urged here that the liability of appellant having been fixed on the first trial and confirmed on appeal, it became the law of the case, and the subsequent judgment should bear interest from the date of the former. Interest has relation to an ascertained principal sum. The amount of the judgment in this case after reversal was not ascertainable until the question of excessiveness presented by the motion for a new trial had been determined, and hence appellant would not meanwhile be in default for interest . . ."

E. Contrary to the District Court's Conclusion, Its Original Judgment Did Not Fix Douglas' Damages With Such Certainty as to Start the Running of Interest.

As discussed above (pp. 18-19, *supra*), the settled California rule is that where the "market price" element of the statutory formula for measuring the seller's damages for a buyer's nonacceptance of goods (Cal. Civ. Code §1784(3)) is not "well-established", pre-judgment interest is not allowable because of the "certainty" requirement of the California interest statute (Cal. Civ. Code, §3287).

In his original Opinion following the first trial, the District Court expressly conceded that the market prices for oil on March 10th and April and May, 1958 (the "times" it concluded were relevant), were not "well-established" and that pre-judgment interest was hence not allowable under California law [R. 77].

The same court, on remand, has concluded that its judicial determination of market prices for such three month period in its original April 20, 1960, judgment created certainty where before there admittedly was none, and that this Court's reversal of such judgment somehow set the final seal of approval upon such factual determination.

Appellant respectfully submits that the District Court has refused to follow this Court's law of the case.

Following the remand, the factual question of damages was *in fieri,* and the District Court was directed to redetermine proper damages in accordance with this Court's view of the law of damages. The District Court had a right on such reconsideration to make a new record (and new and different findings of fact,

if supported by the new record). When finally so decided by the District Court, all questions of damages (fact and law) could then be tested by comparison with such new record and this Court's mandate.

However, the District Court here republished his original findings of "market price" (as amended) and concluded that because of supposed mathematical identity between such new findings for March-May, 1958, and the original findings of "market price" for March 10th and April and May, that such new determination should be given legal effect *nunc pro tunc* to the date of his original vacated findings; and hence, that such determination was "certain" as of April 20, 1960, despite the success of appellant's intervening appeal.

The District Court thus erroneously confused the power of a district court to reach the same result upon a re-trial after appellate reversal, and the legal effect of such a similar result upon the parties' rights during the intervening period, when there was no such "certainty," because there was no judgment.

The majority of jurisdictions (including California) follow the rule that unless the amount claimed due by the plaintiff for breach of contract is certain or can be made certain by mere computation with reference to objective criteria, pre-judgment interest is not allowable. If the final determination of damages can only be made judicially, such damages, by definition, are not capable of computation (5 *Corbin on Contracts,* §1048, pp. 244-245).

The rationale for such a rule, although variously expressed, is premised on the assumption "that the de-

fendant should not be chargeable with interest unless he could have determined with reasonable certainty the amount payable and thus have been able to make a proper tender to the creditor" (5 *Corbin on Contracts,* §1048, p. 245). Stated another way, a debtor should not be burdened with pre-judgment interest on an obligation so nebulous that he must necessarily look to the court to fix its scope. *Cox v. McLoughlin,* 76 Cal. 617, 623, 18 Pac. 100, as quoted in *Coronet Construction Co. v. Palmer,* 194 Cal. App. 2d 639, 15 Cal. Rptr. 601 (1961), hearing denied; and *Lineman v. Schmid,* 32 Cal. 2d 204, as quoted in *Axell v. Axell,* 114 Cal. App. 2d 248, 250 P. 2d 182 (1952), hearing denied.

Some indication of the uncertainty which existed on remand of the amount due is shown by the fact that Douglas claimed $130,000 principal damages (plus interest) on the remand [Clk. Tr. p. 43]; while after giving Douglas the benefit of every "equitable" doubt, the actual judgment was for principal damages of but $114,038.64 [Clk. Tr. p. 119].

The involved argument by which the District Court attempted to justify the allowance of pre-judgment interest was as follows: (1) This Court approved, *sub silentio,* the original findings of "market price" for March, April and May, 1957 [R. 92]; (2) By holding that the District Court's misconstruction of Monolith's contract obligation to take oil and erroneous allotment of "too much oil" to the months of March, April and May justified reversal, this Court really "intended" to approve so much of the District Court's original allotment as could mathematically

be said to remain after the re-allotment directed; (3) That the portion of Douglas' damages ascribable to such three month period of the contract term were hence capable of being made "certain" by mere computation (monthly quantity x contract price, minus monthly quantity x market price); and, (4) That such three month portion of the total damages so rendered "certain" by judicial extrapolation was legally severable from the remaining, uncertain damages for the purpose of awarding interest on such "certain" portion under California Civil Code, §3287.

While we must admire the tenacity of the District Judge in attempting to achieve what he believed to be an equitable result (and his candor in admitting that he disagreed with the necessary result of this Court's view of the law), such procedure cannot be sanctioned. This is an action at law, to enforce a purely statutory right to damages. The Court was not free to fashion a decree which best accorded with his personal notions of equity.

All four steps in the District Court's argument are untenable. First, when a court of appeals reverses a judgment for damages *in toto,* all the underlying findings necessarily lose their legal certainty or binding effect, even though they are later republished. In the interim, there is no authoritative pronouncement that damages are a particular amount, even though it may be a moral certainty that the district court will reaffirm and even though if it does so reaffirm, such damages are then capable of mathematical computation. The legally significant event is the reaffirmance —not the expectation. Thus, unless and until there

is an authoritative decree either fixing the dollars due, or prescribing *each* element in the damage formula, the damages are not "certain" nor are they "capable of being made certain by computation."

Second, the power of "interpretation" the District Court arrogated to itself—that this Court did "not intend to disturb" a portion of such original findings—exceeded the District Court's power. This Court is quite capable of employing language appropriate to a modification when it so desires. The word "reversed" has a well-defined meaning not subject to dilution.

Third, even assuming that the District Court would probably find the same "market prices" for March, April and May on remand as he did originally for March 10th and April and May, he was not legally obligated to do so. He was given the primary responsibility of deciding whether or not to reopen the case. Although ordinarily prudence would counsel a non-departure from original "market prices", additional evidence, if admitted, could require a different result. In view of such contingency, it can hardly be said that the final result was fore-ordained, and damages for such three month period "fixed" prior thereto.

Finally, and perhaps most importantly, damages can not be thus fragmented to achieve a delusive "certainty" that does not exist. This is not a case involving items in an accounting—some of which are specifically approved on appeal and thus forever foreclosed. Clearly, in the latter case, the judgment of the appellate court directing the entry of a particular dollar judg-

ment does render the damages "certain"—for the lower court is compelled by the mandate to enter such specific judgment and no other. Such items as are approved retain their vitality in unbroken continuity.

F. Douglas' Acquiescence in the District Court's Original Denial of Pre-Judgment Interest and Failure to Raise Such Point on the First Appeal or to Seek to Recall the Mandate Foreclosed Its Right to Relitigate Such Question.

We are persuaded that in *United States v. Hougham,* 301 F. 2d 133 (1961), when it held that the court of appeals may frame its mandate appropriately, this Court foreclosed the addition of pre-judgment interest here.

In any event, the failure by Douglas to seek pre-judgment interest on the first appeal, or to move to recall the mandate, amounted to a waiver of any claimed right or equity to such pre-judgment interest. *Clinton v. Joshua Hendy Corporation,* 264 F. 2d 329, 334, 9 Cir., 1959.

As this Court points out in *Yanow v. Weyerhauser Co.,* 274 F. 2d 274, 9 Cir., 1959 (p. 278):

> "It is to be noted, however, that Rule 60(b) contains an express condition upon which the relief there provided for may be granted as follows: 'The motion shall be made with a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.' "

Appellant respectfully submits that the 12 months which have passed since the issuance of the mandate

here conclusively establish that Douglas did not make an appropriate application within a "reasonable time".

Finally, it should be remembered that interest is compensatory and not punitive or coercive, and that a federal district court cannot change interest from a means of compensation to a coercive or punitive measure unless a statute so provides. *United States v. Childs,* 266 U. S. 304, 69 L. Ed. 299 (1924).

Here the District Court, compelled to follow a view of the law he did not share, concluded that under "equitable" principles, he could, with propriety, increase appellee's recoverable damages by an interpretation of the mandate. But "equity" is not now (if it ever was) measured by the size of the Chancellor's foot, and a sum awarded as a punishment for the "crime" of "contract breaking" is a penalty, inconsistent with the long-settled rule that the injured party is to be compensated only for its foreseeable damages, *Globe Refining Co. v. Landa Cotton Oil Co.,* 190 U. S. 540, 543-544 (1903), or, as this Court put it—"its bargain" (303 F. 2d 176, 182).

We hasten to say that despite the Court's reaction to our criticism of his interpretative power [Clk. Tr. p. 20], that we are certain that the Court has absolutely no prejudice or animus toward appellant. However, we do believe that consciously or unconsciously, the District Court was straining toward a "right" result, and that the criteria used were hence subjective and not objective.

We did not expect a clean slate on the remand. What we did expect was a fresh look at the facts and law of damages in accordance with the mandate. In view of

the actual procedure used on the remand, we earnestly submit that the District Court attempted to salvage the prior judgment—rather than take a new look at the case in light of his correction by this Court. The difference, we admit, is intangible, but then, so is "justice".

G. The Cases Relied Upon by the District Court in Allowing Pre-Judgment Interest Are Clearly Distinguishable, Since, Unlike This Case, Such Cases Involved Mandates Requiring the Lower Court to Enter Specific Dollar Judgments.

Each of the three cases relied upon by the District Court involved situations where the appellate court specifically approved certain dollar amounts and directed the lower court to enter judgment accordingly. Such cases are clearly distinguishable.

In *Kneeland v. American Loan & Trust Co.,* 138 U. S. 509 (1891), the principal case the Court relies upon [Clk. Tr. p. 88], the mandate of the Supreme Court on the former appeal read:

> ". . . reversed and the cases remanded with instructions *to strike out* all allowances for rental prior to December 1, 1893 . . . *and to allow the rentals as fixed for the time subsequent.*" (Italics ours).

In other words, the Supreme Court directed the entry of a specific decree based upon the elimination of certain disapproved items—a typical "modification".

As Justice Brewer said (138 U. S. 509, 512):

> ". . . the amount of the allowances for these five months was separately stated, and such allowances were sustained by this Court . . ."

Ex parte Columbia, 195 U. S. 604 (1904), involved the propriety of the circuit court's addition of interest to the decree ordered by the Supreme Court on a former appeal (*Columbia v. Cauca,* 190 U. S. 524, 1903). The Supreme Court's former mandate read (190 U. S. 524, 532):

> ". . . The amount allowed by the circuit court of appeals is reduced as stated by $164,200, but in our opinion *the following items must stand:*
>
> | | |
> |---|---|
> | Agreed cost of work on the ground and rolling stock | $233,909.14 |
> | Salaries of executive officers | 108,181.42 |
> | Traveling expenses of officers | 29,385.88 |
> | Expenses and incidentals New York office | 21,727.58 |
> | | $393,204.02 |
> | Deduct paid on account | 200,000.00 |
> | Amount of award | 193,204.02 |
>
> "*Decree reversed,* and cause remanded to the Circuit Court with directions to enter a decree *confirming the award for and up to the sum of $193,204.02.*" (Italics ours).

On the second appeal (*Ex parte Columbia,* 195 U. S. 604) the petitioner complained that as the former decree read "reversed" the allowance of interest was an improper variance from the mandate. However, as Justice Holmes pointed out, the Supreme Court had expressly ordered that a particular decree for a sum certain be entered—no further proceedings were required —and the mandate hence directed a specified "modification".

The *Columbia* case is thus precisely like the "modification" cases where the Courts of Appeal direct the entry of a particular judgment by remittitur—thus modifying the original judgment by diminishing it to a specified sum certain (see cases and comment in 6 *Moore's Federal Practice* 3752). This, of course, is not the situation in this case where the Court of Appeal did not direct the entry of a particular judgment.

Stockton Theatres Inc. v. Palermo, 55 Cal. 2d 439, 11 Cal. Rptr. 580 (1961), was the eighth appeal in the case and the fifth involving the same item of costs. The question was whether the Court's express direction that a cost item was allowable "as a matter of law" on a former appeal (51 Cal. 2d 346, 352, 333 P. 2d 10, 13-14) made such item capable of being made "certain" enough to start interest running thereon from the time the trial court refused on remand to add such item to the rest of the cost bill, or whether the Supreme Court's prior mandate precluded such interest, because in overturning the trial court's denial of such item it used the word "reversed" instead of "modified".

Recognizing the settled California rule that "when a judgment is reversed on appeal, the new award subsequently entered by the trial court can bear interest only from the date of entry of such new judgment. *Cowdery v. London, etc. Bank,* 139 Cal. 298, 303, 73 P. 196" the Court (4-3) held that when an existing judgment for costs is increased on appeal, such procedure is "in law and in fact" a "modification" and not a "reversal", even though the Court "reverses" the order denying such items of costs with directions to the trial court to allow it (55 Cal. 2d 439, 444).

The 4 judge majority of the Court in *Stockton Theatres,* faced with the decision in the *Cowdery* case stating that the legal effect of reversing a judgment was to "entirely vacate it" (139 Cal. 298, 303), was astute to distinguish *Stockton* as involving *the addition of an amount certain to an earlier existing judgment* (the prior cost judgment) and not the attempted revival of an ordinary judgment vacated by a reversal, as in *Cowdery,* holding (55 Cal. 2d 439, 446):

> "This case has no application to the instant one. Not only did the Cowdery case not involve any question of costs, or of interest on costs, but it involved what the Supreme Court held was an indivisible judgment. *That judgment was reversed. Hence it no longer existed.* Here the order allowing the $1,097.37 has existed since December 17, 1954, and has long since become final. *That allowance of costs has never been vacated.* The legal effect of the so-called 'reversal' was not to reverse the allowance of costs, but to add to that allowance. Hence the Cowdery case is not in point." (Italics ours).

The District Court read such cases (*Kneeland, Ex parte Columbia* and *Stockton*) as granting the trial court the authority to decide "what the appellate court actually meant to accomplish" by a reversal.

We assign both the assumption of such claimed interpretive powers and the interpretation itself as plain error.

All three cases involved authoritative decrees by the appellate courts "fixing" and thus "making certain" the precise judgment to be entered below. No "interpretation" was required. The lower court's duty to enter the judgment directed was ministerial.

Compare the facts of such cases with this Court's mandate directing, not the entry of a specific, dollar judgment, but rather such further proceedings (including additional evidence) and redetermination of damages as the District Court should decide were required.

H. The District Court Itself Was Doubtful as to the Propriety of Its Order for Pre-Judgment Interest.

At the hearing on defendant's motion for new trial, etc. [Rep. Tr. of January 3, 1963], counsel submitted that the District Court had erred as to interest, citing *Briggs,* the California law, etc.

In response, the Honorable District Judge was candid in admitting his doubts as to the propriety of his allowance of interest, stating [Clk. Tr. p. 12]:

> "The Court: I just took my best view of it. I gave it considerable thought. I think, and as I said in the memorandum, I think the better procedure would have been a motion for modification of the appellate court judgment.
>
> But nonetheless, it wasn't done and they can do what they please with it.
>
> I think equitably that the result is correct, whether legally it is I am not so sure. But it was my best judgment, at least. That is all I can say."

The District Court was also in error in believing that the statute abolishing the legal effect of court terms also abolished all limitations on this court's amendment of its judgment. The Court rejected counsel's argument that judgments must have some reasonable finality [Rep. Tr. of January 3, 1963, pp. 13-15]. This ruling, of course, was contrary to *Yanow v. Weyhauser Co.*, 274 F. 2d 274, 9 Cir. 1959.

Although the Supreme Court has not seen fit to grant certiorari so as to resolve the asserted conflict between circuits which is said to still exist after *Briggs** (whether interest might, on proper, timely application to the court of appeals to modify its mandate, be allowed, even though the original mandate is silent), let us consider what a "proper application" (334 U. S. 304, 307) would be:

First, of course, as the District Court correctly observed, the former limitation of terms upon the courts' power to act has been removed by statute. 28 U. S. C.

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*The Seventh Circuit has recently held in a series of decisions that where the mandate does not provide for interest the District Court is without authority to direct payment of interest, but has not decided that it itself lacked power in an appropriate case. *Lee v. Terminal Co.*, 282 F. 2d 805 (1961), certiorari denied, 365 U. S. 828 (1961); 301 F. 2d 234 (1962); *Bankers Life & Casualty Co. v. Bellanca Corporation;* 308 F. 2d 757; *Steiner v. Nelson,* 309 F. 2d 19. Of course, the Second Circuit, commencing with *Briggs v. Pennsylvania R. Co.*, 164 F. 2d 21, has always not only so held, but has held that pre-judgment interest on the new judgment is not allowable even by the court of appeals. *Prudence Bonds Corporation,* 213 F. 2d 443 (1954), certiorari denied, 348 U. S. 856 (1954); *Powers v. New York Central Railroad Company,* 251 F. 2d 813 (1958).

§452. Thus, the Supreme Court's reference to this point (334 U. S. 304, 306-307) might seem, at first glance, to be out-dated, as some judges have asserted.**

However, the Supreme Court noted that the court preserved authority to act after the term to protect its processes and not to convenience litigants (334 U. S. 304, 306). It did not hold that the Court of Appeals might not amend its mandate, but only that it should not do so to succor a dilatory litigant.

Today, even after the statutory amendment (28 U. S. C. §452) abolishing terms of court, the same rule applies. The court *can* amend its mandates in appropriate cases (as it could before). However, strong considerations of imparting finality to judicial processes lays a practical duty upon the courts of forbearance to exercise such power except in exceptional cases. *Lee v. Terminal Co.,* 282 F. 2d 805, 301 F. 2d 234, 7 Cir., 1961, 1962 cer. den. 365 U. S. 828 (1961); *Banker's Life & Casualty Co. v. Bellanca Corporation,* 308 F. 2d 757, 7 Cir., 1962.

The power of this court to amend or modify its mandates may theoretically exist forever. But the right of a party to seek such amendment or modification must end sometime, especially where the question and its significance is known to the party, he has competent counsel, and he knowingly follows a different procedural path.

**Judge Frank, dissenting in the *Chemical Bank & Trust Co.,* case, *supra.*

II.

The District Court's Exclusion of Proffered Material Evidence Was Based on a Misconstruction of This Court's Mandate.

A. Preliminary Statement.

Under California law, the computation of a seller's damages for non-acceptance of goods under a sales contract is as prescribed by *California Civil Code,* Section 1784(3), which provides:

> "Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances, showing proximate damage of greater amount, the difference between the contract price and the market or current price at the time or times when the goods should have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept."

In its complaint, Douglas first claimed the difference between the contract price and the market price as damages [R. 12], and in its second cause of action claimed "special circumstances"—that because of a lack of market in Bakersfield it sold some oil in the Los Angeles Basin and used some for refinery fuel [R. 13-14]. Douglas offered proof on each of these inconsistent theories [Exs. 52, 63; R. 113-114, 142-154]. On conflicting evidence as to the "special circumstances," the District Court held that the Bakersfield market was the relevant market; and that under the circumstances the measure of damages was the difference between the contract price and the market price [R. 77, 92]. Douglas did not appeal.

This Court's Opinion fixed the "times when the goods should have been accepted" (303 F. 2d 76, 81).

The two remaining items for determination were the "contract price" and the "market price" for each month, October, 1957-May, 1958.

On the remand, the District Court reopened the proceedings and allowed evidence of oil sales in October and November (going to the element of "market price") to be introduced (because there was *no* evidence of sales in those months in the original record), but refused Monolith's request for permission to offer proof of oil sales in the other months (going to the element of "market price") to supplement the original record, and refused to admit evidence of Douglas' benefit of relief from return performance (going to the element of "contract price") [Clk. Tr. pp. 13-34, 56, 85-86].

The materiality of the excluded evidence of other oil sales by the other Bakersfield refiners is clear.

However, although perhaps not so apparent, the excluded evidence of Douglas' benefit of non-performance is also material. Under the contract [R. 16], Douglas was required, on Monolith's order, to stand ready to transport and deliver oil into Monolith's receiving facilities. Douglas' proof at the original trial, tended to show that the cost it incurred in transporting oil to Monolith was greater than the transportation factor included in the contract [R. 179-180]. As Douglas' counsel put it [R. 180]:

> "Mr. Tollefsen: And all I am trying to do by this witness is to show that our cost is in excess—

The Court: Is in excess of the Public Utility Rate.

Mr. Tollefsen: That is correct."

Plainly, since under the contract, the P.U.C. rail rate was used as the transportation factor [R. 17], and since Douglas claimed it hauled the oil in its own trucks at a cost "in excess of the Public Utility Rate", the cessation of performance conferred a benefit on Douglas —the transportation loss it was absorbing as part of the contract price. In such a case, it was plain error to fix the "contract price" by subtracting the transportation factor and taxes from the delivered price set by the contract, as the Court did here [R. 76; Clk. Tr. p. 86].

Other examples of the benefits Douglas obtained were: (1) the exchange fee Douglas saved by not having to obtain oil from others to meet permissible maximum demands under the contract [R. 144, 149-150, 166-167]; (2) the cost to Douglas of storing oil to meet Monolith's demands.

Monolith assigns as error both the District Court's refusal to admit available material evidence of oil sales to supplement the original record, and its refusal to admit evidence as to the benefits Douglas secured by not having to perform the contract.

B. The Facts.

1. *The Background—The First Trial and the Appeal.*

At the first trial, the primary thrust of Monolith's defense was that under the circumstances there had been no default under the contract—a defense of non-liability. Its second primary defense was that if there had been a default, the quantity of default (both total and

monthly) was much less than Douglas asserted. As a consequence, and because of the uncooperative attitude of the oil industry [Clk. Tr. p. 35], very little time was devoted to the Bakersfield market price of fuel oil, and the evidence relating to oil sales therein [Exs. 52, 54, 71, W; R. 434-435, 584]. Douglas offered evidence of its own oil sales [Ex. 52], and evidence of sales by Bankline [Ex. 71]. Such evidence was of oil sales in the period December, 1957-May, 1958. Douglas did not offer *any* evidence as to either Bakersfield oil sales or market price for the months of October and November, 1957. Monolith, at Douglas' request, prepared Exhibit W—showing the prices Monolith paid for oil in the period January, 1958-April, 1958. Monolith also proved the Bakersfield posted prices for the contract term [Exs. 54, K, L; R. 116, 120-121]. Hand, an independent oil broker, testified as to the prices he paid in Bakersfield in the period January-May, 1957, without specifying quantities [R. 434-437].

Thus, the cumulative evidence of both parties as to oil sales and prices in the Bakersfield market was limited to the months of December, 1957-May, 1958; and was limited to two of the six operating refineries (with the exception of Monolith's purchases).

In its Memorandum Opinion [R. 74], after first ruling that Monolith had breached the contract, and that defaults had occurred of 24,266 barrels as of March 10, 1958, and 130,000 barrels in April and May, 1958, the District Court found that the market prices on such dates were $1.90/bbl. on March 10th and $1.60/bbl. in April and May, 1957, explaining that "To arrive at market price I have taken into consideration the quanti-

ties of oil to be sold, averages of sales prices, and oil purchases by the defendant." [R. 77]. Such ruling was incorporated in the formal findings [R. 92].

On the appeal, this Court sustained Monolith's claim that the District Court had misconstrued Monolith's monthly oil obligations under the contract, fixed such obligations for each month of the period October, 1957-May, 1958, and reversed, to enable the trial court "to make its computation of damages within this court's view of the law" (303 F. 2d 176, 181-182).

Such reversal and remand thus required the District Court to find market and contract prices for oil for each of the contract months October, 1957-May, 1958.

2. *Fuel Oil Sales Practices.*

Fuel oil in California is customarily priced and sold with reference to the "posted prices" of the major oil companies [R. 476]. The "posted price" most often so used is that of the Standard Oil Company of California. For example, the Douglas-Monolith contract price escalated with the Standard Oil posted price of El Segundo, California [R. 16-17]. Standard Oil's Bakerfield posted price was 5¢/bbl. higher than its El Segundo posted price during the contract term (August 1957-May, 1958) [R. 116]. During the contract term, the Standard Oil posted price at Bakersfield was as follows [Exs. 54, K, L; R. 116, 120-121]:

July 1957-January 9, 1958	$2.95/bbl.
January 10-April 12, 1958	2.75/bbl.
April 13-May 31, 1958	2.55/bbl.

The other companies' posted prices conformed to Standard Oil's reductions in each case shortly after [Ex. R-A, p. 17].

Fuel oil is sold either on contract or on the "spot market". In either event, the selling price is usually related to the then posted prices [Ex. R-A, pp. 13-17].

3. *The Bakersfield Fuel Oil Market.*

In the period 1957-1958, there were eight operating refineries in the Bakersfield area [Clk. Tr. p. 36, lines 3-18]: Standard Oil, Sunland, Mohawk, Golden Bear, West Coast, Palomar, Bankline and Douglas.

4. *The Remand Proceedings in the District Court.*

After the mandate and opinion of this Court were filed [Clk. Tr. pp. 2-12], Monolith brought on for hearing a motion that the case be reopened and further evidence taken [Clk. Tr. pp. 13-17]. In substance, Monolith asked permission to:

(a) Obtain and offer evidence of oil sales by all Bakersfield refineries in October and November 1957—as to which the original record was silent;

(b) Obtain and offer evidence of oil sales by all Bakersfield refineries in the remaining months as to which the original record was deficient, in order to complete the record on this point.

(c) Offer evidence as to the value to Douglas of its relief from return performance.

Monolith showed that the remaining refineries would not voluntarily disclose such information and asked for the process of the Court to take depositions to develop such evidence [Clk. Tr. pp. 35-37].

By its Order of August 24, 1962, the District Court granted Monolith's motion "for the sole purpose of taking evidence of sales of fuel oil during the months of October and November, 1957." [Clk. Tr. p. 56]. The Court denied Monolith's motion to complete the record as to sales by the other refineries in the rest of the contract term, observing that "evidence of sales at times other than the above was developed at trial" [Clk. Tr. p. 56]. The "evidence" referred to was, of course, the sparse evidence of Douglas and Bankline sales and Monolith purchases. The Court's criteria for determining whether additional, supplementary oil sales evidence should be admitted was not whether such additional evidence was relevant. Instead, the Court held that *no* evidence should be admitted regardless of its materiality and relevancy to the question to be decided, if there were *some* evidence in the original record [Rep. Tr. August 13, 1962, pp. 4-5; Clk. Tr. p. 56].

Thereafter, Monolith took the depositions of spokesmen for the six of the eight Bakersfield refineries which produced and sold fuel oil, 1957-1958 [Clk. Tr. pp. 58-70]. All except that of Douglas were taken pursuant to subpoena [Clk. Tr. pp. 75-78]. In accordance with the Court's Order limiting the scope of the reopening [Clk. Tr. p. 56], the interrogation of such deponents was limited to oil sales in October and November, 1957, although such witnesses then had in their possession their companies' records of all oil sales, 1957-1958 [Clk. Tr. pp. 130-131].

The remand trial was held on October 15, 1962 [Rep. Tr. October 15, 1962]. Monolith again asked the

Court to reconsider its Order limiting evidence to oil sales in October and November, 1957 [Rep. Tr. pp. 3-4]. The Court summarily denied such motion and declined to hear the grounds of counsel's motion [Rep. Tr. p. 3, line 23, to p. 4, line 1]. The Court stated that no matter what the depositions revealed, the Court would not entertain the motion [Rep. Tr. p. 4, lines 2-23].

Because of counsel's recent illness and hospitalization, associate counsel presented Monolith's case. As he began a short opening statement of the procedure, the Court cut him off and directed him to "proceed with the evidence" [Rep. Tr. pp. 5-6]. The depositions were then offered and received in evidence as Exhibit R-A [Rep. Tr. pp. 6-7]. Monolith also offered three exhibits summarizing the testimony and statistical data in Exhibit R-A: (1) Exhibit R-B—"All Sales of All Bakersfield Refineries" a summary of Bakersfield oil sales, October-November, 1957 and the average price for each month; (2) Exhibit R-C—"Sales Prices—Weighted Averages", a graph of the data on Exhibit R-B correlated with the "posted price"; and Exhibit R-D "Evidence of Market Now in Record" [Rep. Tr. pp. 8-10].

Following presentation of Monolith's evidence, and argument by counsel, this short hearing was then terminated. Douglas offered no additional evidence, except an Exhibit demonstrating its view of the record evidence—Exhibit R-1. In closing, Monolith's counsel offered to prove (if given the process of the Court), that the great majority of oil sales during the contract term were at substantially above the prices reflected in the

original record [Rep. Tr. pp. 26-27]. The offer was denied.

The evidence showed that the average price of the oil sold in the Bakersfield market in October and November 1957, was $2.74-$2.77/bbl. or about $2.75/bbl. [Exs. R-A, R-B]—20¢/bbl. less than the posted prices of $2.95/bbl.

When the District Court issued its Opinion, it found a "market value" for October and November, 1957 of $2.75/bbl [Clk. Tr. p. 86]. However, in the absence of the proffered evidence of all oil sales in the following months, the Court found that the "market value" for December was $2.50/bbl.—45¢/bbl. less than the posted price; for January was $2.10/bbl.-65¢—85¢/bbl. less than the posted price; for February was $2.00—75¢/bbl. less than the posted price; for March was $1.90—65¢—85¢/bbl. less that the posted price; and for May was $1.60—95¢/bbl. less than the posted price [Clk. Tr. p. 86; Exs. 54, K, L; R. 116, 120-121].

Since the Court used a formula to determine "market value" [R. 77] which turned on quantities sold, the excluded evidence of sales of substantial quantities of oil by the other refineries at prices higher than the "market values" found, was clearly relevant and material to the correct determination of damages.

C. This Court Did Not Intend to Prejudge the Necessity of Additional Evidence.

Appellant respectfully submits that the District Court's exclusion of appellants' proffer of evidence of oil sales stemmed from its misconstruction of this Court's mandate, and its consequent erroneous application of the appellate "sufficiency" test, rather than the

correct test—that material evidence which illuminates a crucial issue is ordinarily admissible.

Ordinarily, the appellate court decides whether upon a reversal of the trial court's judgment, further proceedings below are appropriate, and frames its mandate accordingly.* Thus, the court of appeal may reverse and direct a particular judgment; it may reverse and order a complete new trial on all issues (where the error on one issue colors the rest); it may reverse and order a new trial on one issue only; or it may reverse with instructions to proceed in a manner consistent with its opinion—delegating to the district Court the necessary determination of what (if any) additional proceedings are necessary.

This Court's mandate delegated to the District Court the job of initially deciding whether a new trial on the issue of damages only was required in order to correctly apply this Court's view of the law, stating (303 F. 2d 176, 182):

> "If the trial court deems it better to reopen the case to receive further evidence to enable it to make its computation of the damages within this court's view of the law, it should feel free to do so. Obviously, the scope of such inquiry would be rather limited."

So far, so good!

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*28 U. S. C. §2106 provides:

"The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." June 25, 1948, c. 646, 62 Stat. 963.

However, the District Court construed such cautionary direction as vesting him with complete discretion to decide whether to reopen for evidence absolutely essential to compliance with the mandate (oil sales in October and November as to which the original record was bare), and having reopened, to exclude offered evidence of other oil sales material to the ultimate issue, to supplement the original record, on the ground that there was already "sufficient evidence in the record" [Clk. Tr. p. 86].

The genesis of the District Court's restrictive interpretation of the mandate lies in the following circumstances:

(1) At an unreported pre-trial conference in 1960, the Court expressed its tentative view that Monolith had no excuse for breach and that he would exclude evidence of cement production and sales, gas availability, etc. Counsel for Monolith suggested that the excluded evidence should be recorded as provided by Rule 43(c), FRCP. The Court then decided that the evidence would be received, subject to a motion to strike;

(2) This Court criticized the reception of such evidence, even though later stricken (303 F. 2d 176, 180);

(3) This Court, in its reference to a possible reopening said (*id.*, p. 182):

". . . obviously the scope of such inquiry would be rather limited."

On the remand, the District Court was thus confronted with a measure of damages he did not agree with [Rep. Tr. January 2, 1963, p. 18] and an im-

plied admonition not to err again on the side of liberality in admitting evidence. Human nature being what it is, the Court honestly believed that this Court had sanctioned the most restrictive scrutiny possible, and the approval of decision on the original record except in those instances where there was *no* evidence on a point.

We respectfully submit that this Court did not so intend to prejudge the question of the admissibility of additional, material evidence, and that the District Court thus erred in so interpreting the mandate as requiring the application of the appellate "sufficiency" test in ruling on the offered evidence.

D. The Exclusion of the Proffered Oil Sales Evidence Was a Denial of Due Process.

It is a cardinal principle of due process that no one shall be bound or concluded by a judgment unless he has had his day in court. By this is meant that a person shall not be so bound until he has been afforded an opportunity to be heard, and upon such hearing, to offer material evidence to support his cause. In this connection, any departure from the recognized principles of law, however close the adherence to form in procedure, which has the effect of depriving a party of a real hearing, violates the Constitutional guarantee.

When the Constitution requires a hearing it requires a fair one held before an impartial tribunal, *Wong Yang Sung v. McGrath,* 339 U. S. 33, 50 (1950), where the parties are given an opportunity to present evidence on material issues, *Morgan v. United States,* 304 U. S. 1, 18-19 (1938).

It may freely be conceded that there is no constitutional right to a new trial, if the original trial was free

from prejudicial error. The general rule is stated in 12 Am. Jur., Constitutional Law, Section 637, pages 327 as follows:

> "A hearing before judgment, with full opportunity to present all the evidence and the arguments which the party deems important, is all that can be adjudged vital under the guaranty of due process of law. Rehearings or new trials are not essential to due process of law, either in judicial or administrative proceedings. One hearing, *if ample,* before judgment satisfies the demand of the Federal Constitution in this respect." (Italics ours).

However, it is equally true that if there *was* error on the original trial, there may be a right to a complete or partial new trial under the circumstances.

Thus, there is no mechanical rule to determine whether or not due process is violated by a denial of a new trial (in whole or in part). The question turns exclusively upon whether the complaining party has been given a fair opportunity to adduce material evidence.

As Judge Yankwich put it in *Aerated Products Co. v. Aeration Processes,* 95 F. Supp. 23, 29, S. D. Cal. 1950, the question of new trial in the usual case ultimately turns on

> ". . . whether at the conclusion of the case, the record shows the exclusion by the Court of material evidence offered in support of the issues. See *McClyman v. Hamiltan,* 9 Cir., 1950, 180 F. 2d 965, 968."

Where, as here, after reversing, the Court of Appeals has delegated the question of the form of appropriate remand proceedings to the District Court, and has expressly declined to prejudge the admissibility of additional offered evidence, an even more liberal standard applies. The posture of the case has then changed, since the Court of Appeals has for the first time, stated the correct law. The parties are then, in the interest of justice, to be allowed to reexamine the record and to supplement it, where required, with material evidence directed to the law as declared on appeal. To refuse such right to offer additional, material evidence is to deny a fair hearing on some sort of forfeiture theory.

In this connection, it is a general principle that so long as the facts testified to by a party are not conclusively established or admitted, they are open to further proof, and it is error to exclude evidence on the ground that it is cumulative.

As the Court pointed out in *Evans v. Industrial Accident Commission,* 71 Cal. App. 2d 244, 162 P. 2d 488 (1945):

> "We are of the opinion that, as petitioner contends, the refusal of the referee to hear the testimony of the two witnesses produced by petitioner at the hearing constituted a denial of due process of law and therefore was in excess of jurisdiction. Section 5700 of the Labor Code, St. 1937, p. 298, provides that 'either party may be present at any hearing, in person, by attorney, or by any other agent, *and may present testimony pertinent under the pleadings.*' (Italics added.) And the general rule is as stated in 20 American Jurisprudence,

> at page 1043, that 'A party is entitled to call as many witnesses as he deems necessary to the establishment of his claim or defense, subject to the power of the court reasonably to limit the number who may be heard upon any one issue; * * *' Even though the proffered evidence is deemed cumulative, so long as facts testified to be a party are not conclusively established or admitted, they are open to further proof. 53 Am. Jur. p. 94."

As the Court pointed out in *Saunders v. Shaw,* 244 U. S. 317 (1917), the legal principle involved in the trial court's exclusion of evidence on a material issue is the right to a fair trial itself under the Constitution. If evidence is excluded not because it is cumulative or remote, or on some other recognized exclusionary basis, but merely because in the trial court's opinion there is already "enough evidence", it results in a denial of due process. As the Court said in the *Evans* case:

> ". . . The administration of justice is founded on the principle that every litigant shall have a fair opportunity to present to the court material evidence in support of his valid claim. * * * Clearly the commission is vested with a sound discretion to regulate and control the cross-examination of witnesses in proceedings before that tribunal, and its award will not be disturbed on certiorari for mere errors of procedure. But that authority will not justify an arbitrary denial of the right of a litigant to procure competent testimony by deposition or otherwise when the application therefor is seasonably made and pursued with due diligence according to established rules of procedure."

The original record contained the oil sales by but two of the eight refineries operating in the Bakersfield area during 1957-1958 (the contract term)—those of appellee Douglas itself, and those of Bankline, a newcomer. There was no evidence of oil sales by the remaining 6 refineries constituting 75% of the sellers in such market.

The reason for this paucity of evidence of sales was that Douglas stood upon its own sales as the correct measure of "market price", and hence of damages, and Monolith's inability to obtain such data from a close-knit and hostile oil industry. Additionally, the main thrust of Monolith's defense was non-liability, which if successful, would have rendered moot the necessarily expensive and difficult chore of obtaining precise market data known to Douglas but unknown to Monolith. As in patent cases, where the primary inquiry is infringement; so here, the primary inquiry was liability.

Had the judgment been expressly modified and a specific judgment ordered entered, Monolith perhaps could not have prevailed on its claim that the record evidence of damages was insufficient. In such a context, the question would have been whether what evidence there then was in the record was "sufficient"—*i.e.* a quantitive as well as qualitative test. However, upon the reversal, the applicable legal test changed. The controlling principle was no longer the appellate rule as to sufficiency of evidence. Instead, the inquiry shifted to: Is there material, relevant evidence available under the court of appeals' view of the law?

Thus, in applying the appellate test of "sufficiency" of the evidence, and consciously excluding available,

material evidence, the District Court mistakenly and erroneously misconceived his function and power—that of rendering "substantial justice" (Rule 61, F. R. C. P.).

Here, the offered evidence was not cumulative. Instead, as pointed out above (p. 44), it showed substantial sales at 20¢ or more *above* the "market price" found by the District Court.

We respectfully submit that the exclusion of the proffered evidence was a denial of due process.

E. To the Extent the District Court Possessed Discretion to Admit or to Exclude Material Evidence on Remand, He Abused It.

Appellant does not believe that the District Court had discretion in the premises to totally exclude the proffered evidence. Discretion to exclude material evidence would be discretion to deny a fair trial, and hence an unconstitutional delegation of power.

However, to the extent that the District Court had any discretion to control the order of proof, number of witnesses, exclusion of remote or cumulative evidence, etc., he abused it here.

As the California Supreme Court said in *Metropolis Trust & Savings Bank v. Monnier,* 169 Cal. 592, 147 Pac. 265 (1915), in reversing a judgment for failure to reopen and to permit one party to offer additional crucial evidence:

> ". . . We can but repeat the language of this court in Sulloway v. Sulloway, 160 Cal. 508, 117 Pac. 522:

> 'He might properly have been required, as a condition precedent to the granting of his application, to reimburse defendant for the expense of bringing back his witnesses, but the absolute denial of his application to be allowed to introduce evidence on the matters referred to, when he was so clearly entitled to prevail on the merits, and where the effect of a judgment against him would be to practically deprive him for all time of any use or enjoyment of the water rights given him by the will, must be held to constitute prejudicial error.' "

It is a truism that bears repeating that as this Court has put it in *Chicago, Milwaukee, St. Paul & Pacific R. Co. v. Poarch,* 292 F. 2d 449, 452, 9 Cir. 1961:

> "It must be remembered that the conduct of a trial is largely left to the discretion of the trial judge, and unless he has abused his discretion we will not ordinarily grant a new trial. The question is then, Does the record before us in this case show an abuse of discretion by the trial judge?"

We invoke this rule with confidence, in the knowledge that the District Court excluded the offered evidence, not because of any exclusionary rule, not because the evidence lacked probative value, not because it would unreasonably delay orderly proceedings, but purely and simply because the Court believed (erroneously, we submit) that this Court's directions (303 F. 2d 176, 182) required such exclusion.

We start with the major premise expressed by Rule 1, Federal Rules of Civil Procedure.

> ". . . They shall be construed to secure the just, speedy and inexpensive determination of every action."

The Rules indicate a policy to disregard technicalities and form and to determine the rights of litigants on the merits, *Holley Coal Co. v. Clobe Indemnity Co.,* 186 F. 2d 291, 295, 9 Cir. 1950, by giving them a broad and liberal construction, *Batelli v. Kagan & Gaines Co.,* 236 F. 2d 167, 9 Cir. 1956.

In a case of this sort, where no book gives the correct formula answer (*Cf. Flintkote Company v. Lysfjord,* 246 F. 2d 368, 391, 9 Cir. 1957, quoting Judge Wyzanski, in *Cape Cod Food Products v. National Cranberry Ass'n,* D. C., 119 F. Supp. 900, 910), the policy of the law favors admission—not exclusion —of evidence.

Rule 43, F. R. C. P. provides in part that the most generous, liberal standard (federal statutes, courts of equity or state court) shall be applied in determining the admissibility of offered evidence, and, as Professor Moore has put it, Rule 43(a) was designed to revolutionize federal evidence and place admissibility upon the sole basis of relevancy and materiality; or stated another way, "The cast of subdivision (a) is toward admissibility, not exclusion." Thus, he who argues against the exclusion of material evidence bears the burden of persuasion.

Here, as in other areas of the law, competing general principles are apparently in opposition. One principle—that the trial judge has discretion as to the conduct of the trial, the reception of evidence, etc.—is seemingly contrary to the other—the policy of the law is to allow a party to offer all material evidence available in support of his position.

The contradiction, however, is more apparent than real. The trial judge's discretion is to limit the trial to material evidence—and not to exclude material evidence so that the trial may be completed within a fixed, arbitrary period of time.

The true end of the judicial process is justice (as near as may be). The orderly conduct of a trial will reduce the time spent (which is desirable). However, if the time saved is at the expense of excluding illuminating, material evidence, the time saved is but an illusion, and justice is reduced to clock-watching instead of evidence evaluation.

"Judicial discretion" is a "sound judicial discretion" (*Commercial Pepper Corp. v. Pepper,* 187 F. 2d 71, 5 Cir. 1951)—and not an arbitrary discretion. "Discretion" which, while formally correct, has as its direct effect the non-production of material evidence upon a crucial issue short-circuits the very foundation of our Anglo-Saxon conception of justice.

As Mr. Justice Vallée so aptly put it in *In re Buchman's Estate,* 123 Cal. App. 2d 546, 267 P. 2d 73, 84 (1954), hearing denied:

> "Judicial absolutism is not a part of the American way of life. The odious doctrine that the end justifies the means does not prevail in our system for the administration of justice. The power vested in a judge is to hear and determine, not to determine without hearing. When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets established standards of procedure. It is not for nothing that most of

> the provisions of the Bill of Rights have to do with matters of procedure. Procedure is the fair, orderly, and deliberate method by which matters are litigated. To judge in a contested proceeding implies the hearing of evidence from both sides in open court, a comparison of the merits of the evidence of each side, a conclusion from the evidence of where the truth lies, application of the appropriate laws to the facts found, and the rendition of a judgment accordingly."

Therefore, if, as here, a judge's conception of his duty proceeds from an erroneous conclusion as to his power to receive additional evidence, and he renders a judgment accordingly, the judgment cannot stand, however perfect the outward form may be.

F. In the Absence of Evidence to the Contrary, Under Well-Settled Principles, There Is a Presumption That the "Market Price"—"Posted Price" Relationship in October-November, 1957, Continued Through the Contract Term.

It is a basic principle that a thing once proved to exist continues to exist as long as evidence to the contrary is not put forward. *California Civil Code,* Section 1963(32).

Here when *all* the evidence of oil sales was produced for October and November, 1957, the mathematical average of the prices of the total oil sold ($2.75/bbl.) was 20¢/bbl. less than the posted price ($2.95/bbl.).

In the absence of similar complete proof of all oil sales in the rest of the contract term, it must be presumed that such "market price"—"posted price" 20¢ differential continued throughout the contract term.

On this premise, the District Court's findings of market prices [Clk. Tr. p. 86] would change: The December, 1957 market price would be $2.75 (instead of $2.50); the January 1958 market price would be $2.75-$2.55 (instead of $2.10); the February 1958 market price would be $2.55 (instead of $2.00); the March 1958 market price would be $2.55 (instead of $1.90); the April, 1958 market price would be $2.55-$2.35 (instead of $1.60) and the May 1958 market price would be $2.35 (instead of $1.60). The difference in damages would be enormous.

While there was evidence that the Douglas and Bankline sales in October and November, 1957 were well below the going market price [*e.g.* Ex. R-A, p. 15], and that the "spot market" during such two months was the posted price of $2.95/bbl., Monolith does not now challenge the propriety of using a mathematical average of all oil prices—$2.75/bbl.—for such months. What Monolith claims as fundamental error is the District Court's exclusion of available material evidence of oil sales in the later months, which, if averaged in with the sales data in the original record would have resulted in higher "market value" for such months and hence decreased damages.

As has been demonstrated, the present record evidence is that of the 2 refineries who were the "low" sellers as compared with the rest of the industry. It was unfair to exclude evidence of the other refiners who sold at higher prices.

G. The Evidence Was Admissible Under California Law.

It is plain that had this case been tried in the California courts, the trial court would have been bound to allow the admission of additional evidence of sales of oil as offered here by Monolith.

In the leading California sales case—*Lineman v. Schmid*, 32 Cal. 2d 204, 195 P. 2d 408 (1948)—there had been several prior appeals. On the last prior appeal, the California Supreme Court determined that, because of the lack of a finding resolving a conflict in the evidence as to the market price (on the date it had previously determined that the breach occurred) it was necessary to remand the case "for the purpose of ascertaining that price. The trial court may, of course, take such additional evidence as may be necessary to determine this issue." (25 Cal. 2d 259, 264, 153 P. 2d 313, 315). On the remand, the trial court received additional evidence subject to a motion to strike, and later struck it. This was assigned as error. The District Court of Appeal found no fault on the exclusion of such additional evidence, since it concluded that the Supreme Court's reference to taking "additional evidence" was not mandatory but permissive, and that such evidence "was of an unsatisfactory nature if not completely irrelevant and immaterial", and at best, would merely have added to the existing conflict in the evidence (..... Cal. App. 2d ....., 186 P. 2d 1009, 1012 (1948)).

The Supreme Court modified the judgment by striking pre-judgment interest, and as modified, affirmed, stating with regard to the exclusion of the additional evidence that:

> "The court was not bound to receive or consider additional evidence on the issue of market price for the reason that there was no mandatory direction in that regard. However, the language of this court on the matter of receiving additional evidence on that issue was a recognition that the trial court could do so if such evidence was deemed material. The granting of the plaintiff's motion to strike the additional evidence indicated the trial court's conclusion that the offered testimony of the defendants' witnesses, as is shown by the transcript thereof, was not founded on any sales of the flour, had no relation to the time of the breach, but was based solely on each witness's opinion as of times substantially unrelated to and remote from the date of the breach. Had the court considered this testimony as part of the record the most that could be said of it is that it would have created a further conflict in the evidence of market price. No prejudicial error is shown in granting the motion to strike."

Thus, in a situation practically identical procedurally to the present case—the offered evidence in *Lineman v. Schmid* was rejected primarily because of its immateriality and irrelevancy.

In this case, the offered evidence was as to *actual* sales of fuel oil in the Bakersfield market by Douglas' competitors at the very times of the monthly non-acceptances by Monolith, and was plainly relevant and material. Secondly, the admission of such evidence would not have created a "further conflict," as in *Lineman.* In the *Lineman* case the testimony was not of actual sales prices but of opinions as to "market price"—"based upon factors of cost at the mill, carrying charges and profit." Here the district court was employing a mathematical formula, using the "averages of sales prices" in the market "and oil purchased by defendant." [R. 77]. There was no question of resolving "conflicting evidence" in the sense of choosing between contrary or opposing testimony. Instead, the determination was statistical. Thus, to the extent that there was available evidence of actual oil sales during the relevant periods which were not admitted and hence were not averaged in, the district court's formula failed of its announced purpose.

We respectfully submit that had this case been tried in the California courts, and had the offered oil sales evidence been excluded (as it was here), that it would be held to be reversible error. This Court should reach the same result. *Guaranty Trust Co. v. York,* 326 U. S. 99, 89 L. Ed. 2079 (1945); *Bernhardt v. Polygraphic Co. of America, Inc.,* 350 U. S. 198, 100 L. Ed. 199 (1956).

III.

Mitigation of Damages.

One of Monolith's original defenses was that Douglas, by accumulating oil in storage and by using some in lieu of gas as refinery fuel, instead of selling it month by month in the market, had speculated on a reversal of the falling oil market at Monolith's expense.

The thrust of this defense of non-mitigation was that if Douglas prevailed, the correct construction of the contract resulted in oil defaults each month commencing with October, 1957, which if sold by Douglas with reasonable diligence might have had great probative value in ascertaining the "market price" element of the statutory formula.

The District Court, secure in his construction of the contract—that the 154,266 barrel balance was correctly allocable *only* to March—May, 1958—concluded that Douglas' admitted failure to resell and its accumulation of monthly quantities as they fell due was not, *as a matter of law,* proof of non-mitigation [R. 94]. No finding was made.

This Court approved, apparently under the apprehension that the District Court had decided the question of mitigation as one of a factual failure of proof by Monolith (303 F. 2d 176, 182).

On remand, Monolith pointed out to the Court that its conclusion of non-mitigation rested on its original

construction of the dates of default (since reversed) and the Court agreed that this might be true [Rep. Tr. January 2, 1963, p. 18]. Monolith then requested reconsideration of the point in view of the difference of opinion between the District Court and this Court. The Court declined to do so.

When coupled with the Court's exclusion of material evidence needed to complete the record on "market price", and the Court's decision of the question of damages on less than a complete record, the Court's refusal to reconsider the mitigation question deprived appellant of a fair hearing.

Conclusion.

For the foregoing reasons, appellant submits that the judgment of the District Court should be reversed, and the case remanded with directions that a new trial of the issue of damages be had.

Dated: June 10, 1963.

Respectfully submitted,

ENRIGHT, ELLIOTT & BETZ,
NORMAN ELLIOTT,
Attorneys for Appellant Monolith Portland Cement Company.

Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

NORMAN ELLIOTT

APPENDIX 1.

Exhibits.

(Rule 18(2)(f) of the Rules of the United States Court of Appeals for the Ninth Circuit.)

[Note: In its original Memorandum Opinion following the first trial [R. 74-75] the Court granted the plaintiff's Motion to Strike "All oral testimony regarding sales of cement, cement and clinker production, and production capacity of the Monolith Plant, and all exhibits pertaining to computations in regard to the foregoing"].

1st Trial and Appeal

Exhibit Number	Received for Identification	Offered into Evidence	Received into Evidence
1-61* (inclusive)	R. 111	R. 111	R. 111
62	R. 151	R. 560	R. 560
63	R. 151	R. 560	R. 560
64	R. 174	R. 175	R. 175
64a	R. 366	R. 366	R. 366–367
65	R. 178	R. 560	R. 560
66a-66f	R. 185	R. 185	R. 186
67	R. 367	R. 367	R. 367
68	R. 537	R. 537	R. 537
69	R. 557	R. 560	R. 560
70	R. 557	R. 560	R. 560
71	R. 570	R. 573	R. 584

*Exhibits 1-61 were the subject of the parties' stipulation prior to the first trial. The parties stipulated that such documents were authentic and genuine, subject to appropriate objections, etc.

Exhibit Number	Received for Identification	Offered into Evidence	Received into Evidence
A	R. 210	R. 330	R. 330–331
B	R. 214	"	"
C	R. 216	"	"
D	R. 222	"	"
E	R. 223	"	"
F	R. 224	"	"
G	R. 227	"	"
H	R. 234	"	"
I	R. 250	"	"
J	R. 254	"	"
K	R. 293	"	"
L	R. 295	"	"
M	R. 295	"	"
N	R. 341	R. 379–380	R. 380
O	R. 341	"	"
P	R. 341	"	"
Q	R. 341	"	"
R	R. 341	"	"
S	R. 344	"	"
T	R. 350	"	"
U	R. 356	"	"
V	R. 359	"	"
W	R. 365	R. 420	R. 420
X	R. 369	R. 370	R. 373
Y	R. 369	R. 370	R. 373
Z	R. 378	R. 378	R. 378
AA	R. 380	R. 381	R. 381
AB	R. 381	R. 381	R. 381
AC	R. 384	R. 396	R. 396

Exhibit Number	Received for Identification	Offered into Evidence	Received into Evidence
AD	R. 384	R. 396	R. 396
AE	R. 396	R. 396	R. 396
AF	R. 397	R. 398	R. 398
AG	R. 397	R. 398	R. 398
AH	R. 399	R. 400	R. 400
AI	R. 403	R. 404	R. 404
AJ	R. 404	R. 404	R. 404
AK	R. 405	R. 406	R. 406
AL	R. 444	R. 444	R. 444
AM	R. 451	R. 452	R. 452
AN	"	"	"
AO	"	"	"
AP	"	"	"
AQ	"	"	"
AR	R. 471	R. 471	R. 471
AS	R. 472	R. 472	R. 472
AT	R. 474	R. 475	R. 475
AU	R. 484	R. 508	R. 508
AV	R. 485	"	"
AW	R. 490	"	"
AX	R. 491	"	"
AY	R. 496	"	"
AZ	R. 499	"	"
BA	R. 507	"	"
BB	R. 538	R. 538	R. 538
BC	R. 538	R. 541	R. 541
BD	R. 543	R. 544	R. 544
BE	R. 544	R. 545	R. 545
BF	R. 548	R. 549	R. 549

2nd Trial or

Remand Proceedings, October 15, 1962, Following First Appeal.

Exhibit Number	Received for Identification	Offered into Evidence	Received into Evidence
RA	Rep. Tr., p. 7*	Rep. Tr., p. 7	Rep. Tr., p. 7
RB	Rep. Tr., p. 7	Rep. Tr., p. 8	Rep. Tr., p. 8
RC	Rep. Tr., p. 9	Rep. Tr., p. 9	Rep. Tr., p. 9
RD	Rep. Tr., p. 10	Rep. Tr., p. 10	Rep. Tr., p. 10
R-1	Rep. Tr., p. 11	Rep. Tr., p. 12	Rep. Tr., p. 12

*All references with regard to such remand exhibits are to the Reporter's Transcript of October 15, 1962 [Transcript of Record, Volume Two].

No. 18664

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MONOLITH PORTLAND CEMENT COMPANY, a corporation,

Appellant,

vs.

DOUGLAS OIL CO. OF CALIFORNIA, a corporation,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

I.

STATEMENT AND HISTORY OF THE CASE.

Appellant Monolith, as purchaser, entered into a fuel oil sales contract in July, 1957 with Appellee Douglas, as seller. The contract was a minimum-maximum quantity contract extending through May, 1958. Default occurred at the end of November, 1957 by the refusal of Monolith to accept certain quantities of oil which it was then obligated to purchase. However, further correspondence took place between the parties and the first clear cut indication that Monolith intended definitely to breach the contract was in March, 1958 [R. 76].* This action was filed in May, 1958 for re-

*For convenience and to avoid confusion, we will use the same designations of the record as Appellant set out in footnote, p. 1, of its brief.

covery of damages resulting from the breach and the cause was removed to the Federal District Court because of diversity of citizenship.

Trial of the case was commenced in February, 1960 and consummed approximately six court days. Judgment was entered by the District Court on April 20, 1960 finding for the plaintiff and awarding damages of approximately $134,000 and costs of suit. In its conclusions of law immediately preceding the judgment the District Court stated:

> "That plaintiff is entitled to judgment in the sum of $132,448.16, without interest until the date of entry of judgment; and in the sum of $1,202.18, with interest at the rate of 7% per annum from March 1, 1958; and for costs of suit." [R. 94].

The item of $1,202.18 represented the contract price for oil purchased and received by the defendant in February, 1958, for which payment was not made, and upon which payment was due on March 1, 1958; and the balance of the judgment was damages for the failure of Monolith to accept the contract quantities of oil which it was obligated to purchase under the terms of the contract.

Monolith appealed to this Court and the trial court's judgment was originally affirmed on January 18, 1962. Monolith requested a rehearing and although the rehearing was denied, the original opinion of this Court was amended on May 16, 1962 to reallocate certain

quantities of defaulted oil to the months of October, 1957 through February, 1958, and to then state that "the judgment is reversed for proceedings consistent with this opinion." (303 F. 2d 176, 182).

Pursuant to the mandate or judgment of this Court, the trial court ordered that the case be reopened for the limited purpose of taking evidence of sales of fuel oil during the months of October and November, 1957 [Clk. Tr. 56]. Subsequently on October 15, 1962, a hearing was held at which evidence was introduced for the specified purpose, and on November 30, 1962, the District Court made and entered its revised judgment awarding damages to Douglas in the sum of $114,038.64 (a reduction of approximately $20,000 from the original amount of the judgment), together with interest at the rate of 7% per annum on the sum of $79,668.98 from April 20, 1960 (the date of entry of the original judgment), and upon the balance from the date of the entry of the revised judgment. The method of arriving at these amounts is set forth in the memorandum accompanying the revised judgment [Clk. Tr. 120].

The present appeal is prosecuted from the revised judgment after denial of Monolith's motions to amend the findings and for additional findings, for a new trial, and to alter or amend the revised judgment.

II.
QUESTIONS RAISED BY APPEAL.

In Monolith's summary statement of the case (Br. 5) it states that "The basic questions presented by this appeal are whether the District Court correctly followed the mandate and whether Monolith was denied a fair hearing below under this Court's view of the law." From this statement and the specifications of errors contained in Appellant's brief, it appears that the questions to be determined on this appeal are essentially the following:

1. What is the proper construction and effect of the mandate of this Court following the first appeal?
2. Whether the Court below properly followed the mandate, and in so doing, whether the trial court abused its discretion or failed to afford Monolith a fair hearing.
3. Whether the Court below erred in refusing to again consider the contention that Douglas had failed to mitigate its damages, after previously having held that Douglas had fulfilled any duty which it may have had to mitigate damages, and after this Court had affirmed the ruling of the trial court at the first appeal.
4. Whether the findings as to market value and the contract price in the opinion of the Court below are clearly erroneous as being unsupported by the evidence.

III.
SUMMARY OF ARGUMENT.

A. The substance and effect of the mandate and opinion of the Appellate Court, and not merely a single word used, controls the subsequent action of the trial court upon remand. It is incumbent upon the trial court to construe the mandate and opinion together in a reasonable manner so as to take the action which he is directed to take "consistent" with the Appellate Court's opinion and to accomplish that which he is instructed to accomplish by the Appellate Court's order.

B. In this instance the trial court correctly determined that the plain effect of the mandate and opinion was not to disturb the findings and the judgment previously entered with respect to the damages to be awarded on the quantity of oil which he previously had properly allotted to the period of March-May, 1958, and that the substance of the Appellate Court's order was to require, and to require *only,* the shifting of some 62,266 barrels of defaulted oil to the months of October, 1957—February, 1958, and the determination by the trial court from evidence already before him, or additional evidence if that before him should be insufficient for this purpose, the damages attributable to this particular defaulted quantity. No action by the District Court was required or was necessary as to the determination of damages for the remainder of the defaulted oil, which had already been properly allotted to the pe-

riod March-May, 1958, excepting the clerical task of computing the dollar amount of these damages on the basis of the findings previously made.

Further, the trial court rightly concluded that since the judgment as to the proper quantity of defaulted oil for the period March-May, 1958 was not disturbed by the Appellate Court decision, interest on this portion of the damages was allowable under 28 U. S. C. Section 1961 from the date of the entry of the original judgment. This interest is not only appropriate but mandatory under the federal statute which applies to interest on federal judgments, and is in no sense "pre-judgment interest."

C. The District Court properly exercised the limited discretion given him in the matter of assessing the damages for the default with respect to the oil allotted to the months of October, 1957—February, 1958 by consulting the record and determining that there was sufficient evidence in the record before him for the determination of the market value and contract price for the period December-February and ordering the reopening of the case for the limited purpose of receiving evidence of market value for the period of October-November, 1957. In this connection Appellant was afforded a fair hearing and an opportunity to offer and introduce all evidence considered by it to be relevant for this purpose. The reopening of the entire issue of damages for further evidence, as requested by Appel-

lant, would have exceeded the authority given the trial judge by the mandate and would have been an abuse of the limited discretion provided therein.

D. The issue of mitigation of damages was litigated at the original trial and made an issue on the original appeal in this cause and was determined adversely to Appellant in both instances. Hence the attempted revival of this issue is foreclosed since the previous rulings are the law of the case.

E. The findings of the District Court, from which it made its calculations of damages as to the various defaulted quantities of oil at the times that such quantities should have been taken, are fully supported by substantial evidence and the calculations thereof are in accordance with the applicable law of the State of California.

IV.

ARGUMENT.

1. The District Court Properly and Correctly Construed and Determined the Effect of the Appellate Court's Mandate.

A. The Mandate and Opinion Are to Be Construed Together in a Reasonable Manner to Determine the Substance and Effect of the Appellate Court's Action.

In its opinion on revision of judgment [Clk. Tr. 85], the trial court, after reviewing the authorities stated as follows:

> "Accordingly, in the instant case I interpret the Court of Appeals' mandate as a modification and not as a reversal as to a portion of the judgment. As I understand the opinion, it was the view of the Appellate Court that the lower court had erroneously included in the computation for damages for the months of March, April and May, 1958, 64,200 barrels of oil which should have been spread back for the computation of damages according to a table submitted by the plaintiff in answer to interrogatories and footnoted in the opinion at page 181.
>
> "It is my view that the Court of Appeals did not intend to disturb the judgment as to the 90,000 barrels which were in default for the months of March, April and May, therefore, interest shall be allowed on the amount of damages for that period from April 20, 1960, the date of the entry of the original judgment."

In opposition, Monolith contends that this Court's use of the word "reversed" indicated that the judgment entered April 20, 1960 was to be completely vacated and set aside and could have no further force or effect for any purpose.

First, Monolith quarrels with the District Court's opinion that the effect of the mandate is controlled by federal law inasmuch as it concerns the construction of a judgment of a federal court. It contended in the court below, and Douglas initally concurred, that California law should be controlling because this was a diversity case. However, it now seems apparent to us that the District Court was entirely correct in this respect. Monolith's argument goes along the line that in diversity cases the substantive law of the state is to be applied. With this we agree. So far as we are aware, however, none of these cases extends this principle to the point that after the federal court has correctly applied the substantive law of the state, the state law controls the *effect* of the federal court judgment. See *Lee v. Terminal Transport Co.* (7th C. 1962) 301 F. 2d 234, in which it was held that once the federal court has taken jurisdiction in a diversity case, the state law cannot control the course of the federal litigation. In the prior opinion (282 F. 2d 805) it was stated that once the case is before the federal court, its jurisdiction encompasses all aspects of the case.

Monolith also objects to the District Court "interpreting" the mandate. Since, as in the case of receipt of any order, it is encumbent upon the court to read and ascertain its meaning, it is not clear to us why the District Court's action in doing just that is con-

sidered objectionable by the Appellant. Apparently the Supreme Court of the United States does not consider this to be improper for as said in *Kneeland v. American Loan & Trust Company* (1891), 138 U. S. 509 at 511:

> ". . . on receiving our mandates the Circuit Court *interpreted* them as in effect affirmance of as much of the decrees as allowed these amounts to the intervenors, and its new decrees awarded interest thereon from the date of the former decrees." (emphasis supplied),

and the Supreme Court upheld the "interpretation" of the mandate by the Circuit Court.

The opinion of the Appellate Court is a part of the mandate where there is direction in the mandate to proceed consistently with the opinion. *United States v. Panamerican Petroleum Co.* (S. D. Calif. 1927), 24 F. 2d 206; *Great Northern Ry. Co. v. General Railway Signal Co.* (8th C. 1932), 57 F. 2d 457. The mandate is to be construed reasonably. *Wilkinson v. Massachusetts Bonding & Insurance Co.* (5th C. 1926), 16 F. 2d 66. Perhaps the use of the word "construe" would be more apt than "interpret", but in either event the District Court is under duty to consult both the mandate and the opinion in construing the mandate to ascertain its substance and effect. *Ohio Oil Co. v. Thompson* (8th C. 1941), 120 F. 2d 831, cert. den. 314 U. S. 658.

The mandate, including the opinion with which the District Court was admonished to comply, must, as any document, be read and interpreted or construed reasonably so as to determine its substance and effect. If the District Court were to ignore its substance, by

reason of the form or the language used, it would be neglecting its plain duty.

Under the federal law, the substance rather than the form or the language used in a judgment governs its effect. This is a principle of long standing application in the federal courts. In *Kneeland v. American Loan & Trust Co., supra,* the court stated at 511-512:

> "We think the ruling of the Circuit Court was correct. The amount of the allowances for these five months was separately stated, and such allowances were sustained by this court. While the former decrees were in terms reversed, and the cases remanded for the entering of new decrees, yet, the terms of those new decrees were specifically stated, and insofar as the separate and distinct matters embraced in the former decrees were ordered to be incorporated into the new, it is to be regarded as *pro tanto* an affirmance. Equity regards the substance and not the form. *The rights of the parties are not to be sacrificed to the mere letter, and whether the language used was reversed, modified, or affirmed in part and reversed in part, is immaterial.* Equity looks beyond these words of description to see what was in fact ordered to be done. Illinois Central Railroad v. Turrill, 110 U.S. 301." (emphasis supplied).

In *Ex parte Columbia* (1904), 195 U. S. 604, which Appellant characterizes as one of the "elderly cases" referred to by the District Court in its opinion on revision of judgment, the trial court's judgment was *reversed* and the cause remanded with directions to enter a decree confirming the award for and up to a specified

sum. Upon objection being made to the allowance of interest from the date from which interest was awarded in the original decree of the Circuit Court, the Supreme Court through Justice Holmes stated that by confirming the award as to some of the items, which in its opinion it stated were treated as separate matters, some of which may be disallowed without affecting the rest, it had in effect declared that these should have been paid on the date specified in the original award and said at 605:

> "To that extent the decree below stood approved; and as no disapproval was expressed of the consequence attached by that decree to the failure to pay, it is impossible to say that there was an implied prohibition of again attaching the same consequences in the new decree."

See also *Rector v. Massachusetts Bonding & Insurance Co.* (CCA-DC 1951), 191 F. 2d 329, 331 in which the court said:

> "The cases indicate, however, that a partial reversal does not necessarily carry with it the conclusion that a judgment has not been affirmed. Instead the tendency has been to consider a judgment affirmed unless it is 'wholly reversed' or at least 'substantially reversed' by the appellate court."

And further at 332:

> "Even a technical designation of reversal will not discharge liability on a bond conditioned upon affirmance *if the facts demonstrate a partial affirmance.*" (emphasis supplied).

The same principle is recognized and followed as well by the courts of California, for in the latest pro-

nouncement of the Supreme Court of that state in *Stockton Theatres, Inc. v. Palermo* (1961), 55 Cal. 2d 439, 11 Cal. Rptr. 580, the court said *with respect to its own mandate* which had "reversed" the trial court's judgment, that

> "This 'reversal' obviously was, in law and in fact, a modification. When the facts are considered in their entire context this conclusion is inescapable.
>
> . . .
>
> "Although the order in that case was couched in terms of a reversal with directions, *it had the legal and practical effect of* modifying the original award." (pp. 443-444, emphasis supplied).

B. The Substance and Effect of Mandate Was to Affirm the Judgment as to Damages for the Reduced Quantities of Defaulted Oil for the Months of March, April and May, 1958.

A review of this Court's opinion and mandate indicates, as the District Judge concluded, that the substance thereof was that the April 20, 1960 judgment was merely modified, or reversed in part and affirmed in part, rather than being rendered *functus officio* as Appellant contends. "What was in fact ordered to be done," and *all* that was ordered to be done, was that the District Judge was instructed to compute the damages due Douglas with respect to the 64,266 barrels of defaulted oil which the Appellate Court held to have been erroneously included in the computations for the months of March, April and May, and should have been allotted to the preceding months of October through February, and to receive further evidence for this limited purpose if he deemed it necessary.

In regard to the trial court's interpretation of the contract as a maximum-minimum contract and its determination that it had been breached and that there was no legal excuse therefor, this Court said, "We agree with that judgment." (303 F. 2d 176, 180). The disposition of the trial court of the issues of fraud, mistake, custom, accord and satisfaction, etc. was upheld. It was only in respect to the damages that any difference of opinion was expressed by the Appellate Court and this was limited to the proper manner of computing the damages because the trial court "allotted too much of the breaches to the last three months." (Idem, 181-182).

On this prior appeal, the findings of the trial court as to the contract price and the market value for the oil which Monolith was obligated to purchase during these three months of March, April and May were not attacked and were not disturbed. The only question involving these findings which was raised on the prior appeal was whether the court had correctly applied the California law of damages (Appellant's Opening Brief on first appeal, p. 4). This question had nothing to do with the sufficiency of the findings as to the contract price or the market value, and the argument was directed to claimed errors in the determination as to the defaulted quantities, mitigation of damages, and applying the market value for March to quantities which Appellant claimed should be allotted to the prior months. Neither the amount nor the allowance of interest on the February deficiency were put into question.

It thus appears from this Court's opinion that the only real difference between the Appellate Court and

the trial court in this matter was the determination by this Court that the trial court had allotted too much of the defaulted oil to the last three months. This was the matter to be corrected upon the remand. This is what the District Judge considered that he was ordered to do and this is what he did. His action is now claimed as error, denial of a fair trial, denial of due process, and an abuse of discretion by Appellant on this appeal.

The Appellate Court stated in its opinion, after indicating its disagreement in regard to the time at which certain quantities of the oil had been adjudged to be in default, that "If the trial court deems it better to reopen the case to receive further evidence to enable it to make *its computation of the damages* within this court's view of the law, it should feel free to do so. Obviously, the scope of such inquiry would be rather limited." (303 F. 2d 176, 182). This statement was "interpreted" by the District Judge, as well as by us, as meaning that the Appellate Court did not intend to disturb any part of the findings or the judgment which did not involve the quantities of defaulted oil which were reallotted to the months of October through February. The judge was given some discretion to reopen the case to receive further evidence if he felt it necessary to enable him to make the necessary computation of damages with respect to that particular quantity of defaulted oil. He was, however, admonished that the scope of any such inquiry should be rather limited. This statement was taken, we believe, by the District Judge as indicating that if the record before him was sufficient for him to make a new computation of the dam-

ages arising from the default as to the quantities now allotted to October through February, he should so do from the evidence in the record, and if the evidence before him was not considered to be adequate for that particular purpose, he could and should reopen the case for the limited purpose of taking evidence from which he could determine the market value of that oil at those times.

This, again, is exactly what the District Judge did. He examined the record to determine for what period of time during these particular months the evidence already before him was not in his opinion sufficient to make the determination required under the mandate. He concluded that evidence of market value during the months of October and November, 1957 was necessary and hence reopened the matter for presentation of such evidence. In his opinion on revision of judgment [Clk. Tr. 86] he says:

> "It was my view that there was sufficient evidence in the record to make a determination of market value for December, 1957 as well as January and February, 1958. (See Summary of evidence of sales page 12, appendix to defendant's opening brief filed in the Court of Appeals) However, inasmuch as there was no evidence in the record of sales during the months of October and November, 1957 the motion was granted to the extent only of reopening the case to take such evidence."

We submit that the action of the District Judge was entirely appropriate and in full conformity with the direction from this Court to him in its mandate. The

language of the opinion referred to his "computation of the damages within this court's view of the law," (303 Fed. 2d 176, 182). Since the Appellate Court's view of the law and the District Court's view of the law differed *only* as to the times at which 64,266 barrels of the defaulted oil should have been taken, the only reasonable meaning to be attributed to the "limited inquiry" which the District Court was authorized to make was as to the amount of the damages accruing on the quantitites of oil which had been held by this Court to have been allotted in the wrong months.

The fact that the Appellate Court did not truly reverse the case on the issue of damages, and that this was neither the substance nor the effect of the mandate, is further supported by the statement in the Appellate Court's opinion that "We give Monolith less than it basically contends for in the reduction of damages" (Idem, 182). This statement was taken by the trial court and by ourselves as additional indication that in substance the damage issue was affirmed excepting insofar as it related to the oil which was held to have been improperly allocated to the last three months of the contract.

The propriety of the view taken by the District Court and of its subsequent action is indicated by *Gaines v. Rugg,* 148 U. S. 228, in which the Supreme Court, on a second appeal, stated as follows regarding its action on the first appeal (p. 238):

> "Because this court was dissatisfied with the decrees in respect of the accounting, and only for that reason, it reversed the decrees; but it remanded the causes to the Circuit Court with a direction,

> as the opinion and the mandate explicitly state, for further proceedings to be had therein in conformity with the opinion of this court. *It did not disturb the findings and decrees* of the Circuit Court in regard to the title and possession, but only its disposition of the matter of accounting. The mandate and the opinion, taken together, although they use the word 'reversed' amount to a reversal only in respect of the accounting and to a modification of the decree in respect of the accounting, and to an affirmance of it in all other respects." (Emphasis supplied.)

It has been suggested that the proper procedure for Appellee to have followed was to file a motion to recall the mandate. Since the opinion and mandate were considered by Appellee as being clear, no need for such a motion seemed indicated. Appellee could see no reason under the circumstances to further prolong this already extended litigation by making such a motion, having it determined, and postponing the trial court's compliance with the mandate for such further period of time as might be required for the hearing and disposition of the motion. If Appellant was unable to discern the substance and effect of the opinion and felt it might be prejudiced by subsequent action of the trial court, it had the same right within a reasonable time, to file a motion for recall of the mandate so that its meaning could be clarified for Appellant's benefit.

The avoidance of interest for approximately 2½ years on a substantial portion of the damages originally awarded, is of course the principal object of Mono-

lith's present appeal, and as indicated above, its argument in that regard is one of semantics based upon the use of the word "reversed" by this Court in its mandate, with no consideration being given by Appellant as to the substance, effect or proper construction of what that mandate directed the District Court Judge to do or what it meant to accomplish.

C. The Trial Court in Its Revised Judgment, Properly Included Interest From the Date of the 1960 Judgment on That Part of the Damages Which Was Not Disturbed on the Prior Appeal.

Despite the insistence of Monolith in referring to the interest provided for in the revised judgment as "pre-judgment interest," there was never any pre-judgment interest allowed either in the 1960 judgment or in the revised judgment other than interest on the underpayment of approximately $1,200 for the February deliveries of oil from the time it became due on March 1, 1958. This interest item has not actually ever been questioned and is entirely appropriate under the California statute (Civil Code Sec. 3287), since the February deficiency resulted from deliveries of oil for which payment was made at less than the agreed contract price. It has no relation to the issue of damages for default in refusing to purchase oil under the contract.

With respect to the damages for default in refusing to purchase oil that Monolith was obligated to purchase under the contract, the trial court made a finding that the market value at the time and place such oil should have been accepted was not well established and hence, under the California law, refused to allow any "pre-judgment" interest on these damages. The

characterization of the interest problem on the present appeal as being one of the award of "pre-judgment interest" is therefore quite inappropriate. In the revised judgment there was likewise no allowance of "pre-judgment" interest on the damages which the court found, upon remand, to be assessable with respect to the 64,266 barrels of oil which he was instructed to allot to the months of October-February. Pursuant to the instruction of this Court, the District Judge made his determination as to the contract price and market value of this particular oil for each of such months and entered judgment for those damages and *provided that interest upon such damages would be payable only from the date of the entry of the revised judgment.*

With respect to the damages previously determined to have resulted from the failure to accept defaulted oil during the months of March, April and May, and with respect to the February deficiency, the District Judge provided in the revised judgment that these amounts would bear interest from the date of the entry of judgment on April 20, 1960, since this portion of the judgment and the findings upon which it was based, were not disturbed or altered in any way by the decision on the first appeal. It is emphasized that the interest on this portion of the damages is not in any sense "pre-judgment interest," aside from the single item of the February deficiency.

While the question of pre-judgment interest depends upon the state law in a diversity case, post-judgment interest depends upon the Federal Interest Statute (28 U. S. C. Section 1961). This statute provides that interest shall be allowed on any money

judgment in a civil case recovered in a federal court and that such interest shall be calculated from the date of the entry of the judgment at the rate allowed by state law. We submit that this is the only interest which the District Judge has allowed, again excepting interest on the February deficiency, and that he has complied precisely with the applicable federal statute. In fact, the District Judge had no discretion or alternative but to allow such interest since the statute makes the award of post-judgment interest mandatory. *Moore-McCormack Lines v. Amirault* (1st C. 1953), 202 F. 2d 893.

The distinction to be made between pre-judgment interest, and interest on a federal judgment is very aptly expressed in *Moore-McCormack Lines v. Amirault, supra.* In that case the court considered the claim that pre-judgment interest had been erroneously allowed, and after setting forth the contentions of Appellant under the federal interest statute and of the Appellee under the state statute, the Court said at 895:

> "In considering these opposing contentions, distinction must be made between (1) the running of interest upon a judgment debt from the date the judgment was entered to the date of payment, and (2) the allowance of pre-judgment interest to be included as an item of damages in the total amount of an ensuing money judgment, in order that plaintiff may be more fully and justly compensated for the wrong complained of. The latter may be regarded as a part of the substance of the claim sued upon, for which a money judgment is sought.
>
> . . .

> "28 U. S. C. Section 1961 belongs in category (1) above. . . . The purpose was simply to provide that money judgments of federal courts should bear interest from the date of the entry of the judgment, collectible in the same way and at the same rate as provided in the local state law for the allowance of interest on money judgments recovered in the state courts. Interest upon the amount of a money judgment rendered by a federal court runs automatically, by the mandatory provision of 28 U. S. C. Section 1961, even though the judgment itself—as in the case at bar—contains no specific award of such interest."

In further clarification the court said also at 895:

The apparent confusion as to the interest properly due on the undisturbed portion of the judgment is created by the failure of Appellant to recognize this distinction. Practically, it may be that there is no real difference in result since the law of California relative to the allowance of interest on judgment from the date of entry is the same (See 3 Witkin, California Procedure p. 1921 and cases there cited).

However, so that the question can be clearly and squarely presented to this Court, our position is that we do not make any claim for pre-judgment interest other than the interest awarded with respect to the February deficiency. What we do claim is interest from the date of the entry of the original District Court judgment in respect to the damages properly assessable for the refusal of Appellant to take the quantities of oil which, under the contract, were properly allocable to the months of March, April and May, 1958.

We make no claim to pre-judgment interest as to the further amount of damages to which the District Court has determined that we are entitled for the defaults occurring in the prior months of October-February. We do claim interest on these amounts from the date of the entry of the revised judgment, and this is all of the interest that the revised judgment provides thereon. Our claim to interest on the damages for the defaulted quantities of the months of March, April and May, 1958 is based upon the award of damages for these defaults by a federal judgment entered April 20, 1960 and our construction of this Court's mandate, with which construction the trial court concurred, that the "reversal" on the original appeal in this case did not deny us these damages or reopen the question of the computation of the damages which resulted from Appellant's default in these months.

Appellant further obscures the real question by referring to the principle that a party cannot be chargeable with interest unless he could have determined with reasonable certainty the amount payable and thus have been able to make a proper tender to the creditor (Br. 23-24). This however is a mere recitation of the general rule which is codified by the California Civil Code defining the instances in which *pre-judgment interest* is allowable. It has absolutely nothing whatsoever to do with the allowance of interest after entry of judgment and certainly has no application to the matter of when interest is allowed on a federal judgment. When a judgment is entered, the debtor knows the extent of his obligation. If the judgment is appealed and affirmed, he has known it all along. If the judgment

is appealed and modified, reduced, or affirmed only in part, he also has known of his obligation *to that extent.* If the judgment is actually reversed, he is correct and has had no obligation. In this latter case he has no interest liability. In all of the former cases, he has liability for interest from the date of the entry of the judgment as to all or that portion of which he has not been relieved. He cannot escape his obligation for interest merely by appealing and thereafter contending, somewhat as Appellant contends here, that until the appellate court has made its determination, the debtor is not able to determine the full extent of his responsibility. The situation is analogous to the untenable claim that interest is not allowable on a judgment until the date on which post-judgment motions are determined adversely to the debtor, *Litwinowicz v. Weyerhaeuser Steamship Co.* (E. D. Pa. 1960), 185 Fed. Supp. 692.

If a federal judgment is modified, interest on the judgment is payable, under the Federal Interest Statute, from the date that the judgment was entered, and similarly if a portion of a money judgment is affirmed, interest is likewise payable on the portion thus affirmed, from the date of the entry of the original judgment.

Rule 24(1) of this Court provides that

> "In actions at law where an appeal is prosecuted in this court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the state or territory where such judgment was rendered."

If we are correct in construing the mandate as affirming the judgment for damages as to the last three months of the contract, there should be no question that under this rule, interest would be payable on this undisturbed portion of the judgment from the date of its entry on April 20, 1960. *Swartzbaugh Mfg. Co. v. United States* (6th C. 1961), 289 F. 2d 81, 85, supports this view, the court there saying:

> "The fact that a judgment or decree (including chancery cases where the Appellate Court hears the matter de novo) is reduced on appeal does not prevent the exaction of interest upon the reduced amount from the date of the original judgment or decree" (citing cases).

See also *Litwinowicz v. Weyerhaeuser Steamship Company* (E. D. Pa. 1960), 185 Fed. Supp. 692, in which as to one party a new trial was granted, limited to the issue of damages, unless a remittitur was filed. With respect to the matter of interest after remittitur, it was stated at 693:

> "In the Matyas case, of course, interest would accrue on the judgment as reduced by the remittitur, from the date of the entry of the judgment for the greater amount. This judgment was not vacated, but simply modified by reduction in amount by the plaintiff's remittitur. The position of the parties is precisely the same as though the verdict and judgment had been for this reduced sum. The situation is analogous to that in which an Appellate Court reduces a judgment. As plaintiff points out, the reasoning applied by the court in allowing interest on the judgment as reduced from

> the date of original entry is that the revision of the judgment is a partial affirmance. (*Ex parte Colombia,* 195 U. S. 604; *Kneeland vs. American Loan,* 138 U. S. 509). Whether the judgment or decree below be reduced or increased, interest is allowed on so much thereof as can be said to be 'affirmed' by the Appellate Court, from the date of original entry. *Harris vs. Chicago Great Western Railway Co.,* 7th Cir. 1952, 197 Fed. 2d 829; *Chemical Bank & Trust Company vs. Prudence-Bonds Corp.,* 2 Cir. 1954, 213 Fed. 2d 443."

It should also be remarked that this is not a case of reversal because of excessive damages. A determination of damages pursuant to statutory rule cannot be "excessive" and obviously such determination cannot be considered to have been given "under the influence of passion or prejudice." In this case the damages awarded with respect to the oil held to be properly allotted to the period March-May were computed by the trial court in accordance with the rule prescribed by the applicable California statute. The fact that it was subsequently held that certain quantities of oil had been incorrectly allotted to this period of default, does not make excessive the damages which were awarded with respect to the proper quantities for this period. The reduction in the total judgment which has resulted from further proceedings comes about merely from a reallocation of a portion of the oil to a different period of time and the application of the statutory formula to that quantity at that time. Significantly, no claim was made of "excessive damages" as the basis for the original motion for a new trial [R. 97] or on

the first appeal, and, of course, there was no ruling by this Court that the damages were "excessive" in the legal sense.

The problem thus gets back again to the basic question of the effect of the mandate in the present action. If the trial court has been correct in its construction of the mandate, interest is payable from the date of the entry of the judgment of April 20, 1960 as to the defaulted quantities of oil which were held to be in default during the months of March, April and May, 1958, and not re-allotted to the prior months of October-February pursuant to this Court's opinion.

Monolith contends that the case of *Briggs v. Pennsylvania Railroad* (1948), 334 U. S. 304, precludes this allowance of interest since the mandate here made no express reference to the question of interest. While there appears to be some confusion among the Circuit Courts in regard to the proper application of the *Briggs* decision, it has no application here, where the substance and effect of the mandate was not a reversal, but an affirmance, of the damages with respect to the defaulted oil for March-May, 1958. The *Briggs* case actually stands merely for the proposition that the lower court is bound by and must follow the mandate of the Appellate Court. If the District Judge exceeded the limits of authority and discretion given him by the present mandate, the *Briggs* case principle would come into play, but it is submitted that the authority and discretion given him was not exceeded, and the District Judge in fact complied explicitly with the terms of the mandate. In the *Briggs* case there was a judgment of dismissal which was appealed and this judgment was reversed. There was a

true reversal, and in fact there was previously no judgment entered which provided for interest or upon which interest could have been allowed. The case held that upon such a reversal, interest would not be allowed upon the new judgment until the date of its entry.

In our case, interest is already provided for in the judgment either through the application of the Federal Interest Statute or by the conclusion of law in which the District Court indicated that Appellee was entitled to interest from the date of entry, and unless it is now held that the mandate on appeal wholly reversed this judgment, the judgment, including the provision for interest, continued as to the undisturbed portion thereof from the date of its entry which was April 20, 1960.

Appellant attempts to distinguish the *Kneeland* and *Ex parte Colombia* and *Stockton Theatres v. Palermo* cases, referred to previously, on the basis that a specific dollar amount money judgment was ordered to be entered by the lower court and says that although the term "reversed" was used in the Appellate Court mandate in each case, this was a typical "modification." Thus Appellant seems to agree that the principle which we urge, *i.e.,* that the substance and effect of the mandate, including the opinion of the court as necessarily included by the language which required the trial court to take "proceedings consistent with this opinion," is correct.

We are unable to perceive any legal or practical difference between the affirmance of the judgment as to the March-May defaulted quantities (recognizing that the quantities originally allotted to these months were ordered to be reduced to some extent) with direction

to the trial court to make "its computation of damages within this Court's view of the law," and an order by the Appellate Court directing a reduction in these damages by a specified dollar amount. The necessary findings as to market value and contract price from which these damages were readily ascertainable, had already been made and these findings were, in effect, sustained. Hence there was nothing required of the trial court in respect to these quantities other than to make the computation. The actual computation of these damages by the appellate court would have added nothing, and it must be assumed that the same mathematical answer would have resulted from the computation whether it was performed by the Appellate Court or by the District Judge.

2. The District Court Properly and Correctly Followed the Mandate, and Did Not Abuse the Discretion Given It Therein, and Did Not Fail to Afford a Fair Hearing or Fair Trial to Monolith.

Monolith complains of the lack of a fair trial and even of a denial of due process before the trial court at the hearing following the issuance of the mandate. It refers to the fact that the trial court did not agree with the Appellate Court's opinion as seemingly to indicate that the trial court attempted in some manner to nullify the effect of the partial reversal. It states that the judge arrived at a judgment of approximately the same amount as the April 20, 1960 judgment, which is not at all correct, since the ultimate principal amount of the revised judgment was some $20,000 less than that originally found to be due. It goes

further to remind the court that it is improper to change interest from a means of compensation to a coercive or punitive measure thus implying that in some manner the District Judge arrived at his conclusion as a means of coercing or punishing the Appellant.

So far as these assertions are concerned, we will stand strictly on the record, which we believe indicates that Appellant was afforded full, complete and even an excessive opportunity to present all of the evidence which it desired and which it had any reason to believe supported its case. The District Court at the original trial heard all of the evidence that Appellant wished to produce on any issue, much of it over the objection of Appellee, and the judge extended every opportunity for it to present its case. In fact, as was observed by the Appellate Court in its opinion, "The greatest latitude in proof was indulged. . . ." (303 F. 2d 176, 180) and indicated that the great mass of this evidence might better have been confined to an offer of proof.

There is not the slightest indication anywhere in the record that the trial court permitted its original view as to the proper allocation of the defaulted oil quantities to influence it after remand, or that Appellant was treated unfairly, or that the judge consciously or unconsciously attempted to negate the effect of the Appellate Court's decision and mandate. Any such inference is entirely out of place. Likewise, the trial court's determination of the interest question can, in no manner, be construed as an attempt to punish or penalize Appellant. As stated before, the Federal Interest Statute is mandatory, and hence the court is bound to

follow it and Appellee has a vested right to the compensatory effect of its proper application.

Following the issuance of the mandate, the Appellant filed a motion to reopen the entire case as to the issue of damages [Clk. Tr. 14-34]. The refusal of the trial court to do so is assigned as error in denying Monolith a fair hearing. There had been no order, request for order, or any apparent reason for permitting a piecemeal trial of the action. Actually, under the limitations imposed by the mandate, the reopening of the entire matter as suggested by Appellant, would have been a gross abuse of the discretion of the trial court. See *Southard v. Russell* (1853), 57 U. S. 547; *In re Gamewell Fire-Alarm Tel. Co.* (1st C. 1896), 73 Fed. 908; *City of Orlando v. Murphy* (5th C. 1938), 94 F. 2d 426.

The case of *McClure v. O'Henry Tent & Awning Company* (1951), 192 F. 2d 904, seems particularly in point. In this case the Appellate Court in a previous appeal affirmed the judgment as to one contract in question and reversed as to another and remanded for further proceedings as to the question of damages only. Following this remand the defendant moved to be allowed to introduce additional evidence. The trial court entered judgment, without hearing additional evidence, based upon the evidence in the record. The Appellate Court disposed of the defendant's assignment of error by saying at 905:

> "We cannot agree with defendant's contention that the court was compelled to hear additional evidence upon the remand of the cause. As we stated, the evidence as to a fact vital to the decision of the

cause was in dispute, and it was the duty of the trial court to resolve that dispute. That does not mean that a new trial was necessary. Of course, had the court desired to hear additional evidence on the issue, it was free to do so under our mandate. But it appears from its disposition of the cause that it was satisfied that there was sufficient evidence of record upon which to base its findings and that further hearing was unnecessary."

In *Franklinville Realty Co. v. Arnold Construction Co.* (5th C. 1943), 132 F. 2d 828, the case had been partially reversed and the cause remanded for further proceedings in conformity with the opinion of the Appellate Court, which opinion said that the reversal was limited to the presentation of evidence as to whether or not certain labor and services were used in a construction job. The appellant contended there, as Appellant contends here, that the limited reversal was a complete reversal setting at large all of the issues previously determined and that the trial court erred in limiting the proceedings. The Appellate Court held that the District Court had correctly interpreted the mandate and fairly and correctly reheard and determined the issue on which *alone* the case had been remanded, stating that upon that issue the appellant had been permitted to offer all relevant proof.

Similarly in the *Kneeland* case, *supra,* the appellant had moved in the Circuit Court, after the filing of the mandate, to have the matter of the amounts due to each party referred to a master for investigation and this motion was denied. The denial was claimed

as error. The court said in this regard at 138 U. S. 513:

> "Counsel claims that under the reversal the whole matter of inquiry as to the accounts was opened. On the contrary, the clear language of our decision was to strike out certain specific items and allow others as already fixed. *No new investigation was contemplated in respect to past matters.*" (Emphasis supplied.)

Appellant insisted that the case should have been reopened upon the entire issue of damages because of "newly discovered evidence," [Clk. Tr. 91, 125], and complains of the order limiting the reopening for the purpose of receiving evidence of market value for the months of October and November, 1957.

Appellant made quite a point in the trial court of the fact that it had "discovered" that there were eight refineries in the Bakersfield area during the contract period rather than five or six as some of the witnesses had indicated in their testimony (Br. 41), and mentions that there was no previous evidence of sales of six of the refineries "constituting 75% of the sellers in such market" (Br. 51). The implication of these statements is obvious but the misleading effect is not. Upon the limited reopening of the case by the trial court, the facts were discovered to be that one of the supposed refiners (West Coast Oil Company) was actually a brokerage firm which made only limited sales of fuel oil, and that three of the refineries (Mohawk, Palomar, and Golden Bear) either had not produced or had made no sales of Bunker C fuel oil. This left Standard Oil Company of California, Sunland Refining

Corporation, Bankline Oil Company (now Signal Oil & Gas Company), and Douglas. So that in actual fact there were four refineries selling the product at the time in question, and the evidence introduced at the trial showed the sales of both Bankline and Douglas as well as the posted price of Standard Oil, which is the published price at which it offered to sell its products to prospective purchasers. Thus the only refinery in the area as to which no evidence of price or sales was developed at the original trial was that of Sunland Refining Company. In this respect, however, there was evidence by Mr. Hand, a witness presented by Monolith, that he had purchased oil from Bankline and Sunland during the period from January through May, 1958 at prices of $1.55 per barrel in January, 1958 through March 25, 1958, and $1.20 per barrel for the remainder of the applicable period of time [R. 434-435]. As these prices were below the prices at which Bankline sold oil [Ex. 71], it seems that Mr. Hand's testimony must have pertained to his purchases from Sunland.

Monolith had been in business for a number of years in the particular area and was constantly using fuel oil, and, as said in Appellant's opening brief on the first appeal in the footnote on page 52: "Appellant was the only substantial potential oil purchaser in the Bakersfield area in July, 1957." Its purchasing agent testified that she kept in touch with the market [R. 311] and even professed to do so with respect to the fuel oil market in the Los Angeles Basin [R. 326, 327], even though Monolith was located in the Bakersfield area and hence was normally supplied from that area. In view of this evidence, it seems incongruous

that Monolith did not know of the available fuel oil suppliers who would be able to give pertinent evidence as to market value in that market area at the time of the original trial or was ignorant of the going market prices for oil. Also it cannot be accepted that Appellant or its counsel was without knowledge of the means by which it could obtain the court's process to present any evidence which it might desire, particularly since it did use subpoenas to present the evidence of market value which it felt helpful at the original trial and used the same process to obtain evidence at the reopened hearing.

As a matter of fact the true reason that the court's process was not sought and this supposedly helpful testimony was not presented at the trial was the firm conviction of the Appellant that it would be held not to be liable for its disregard of its contract obligations, and its hope that the question of damages might therefore never be reached [Clk. Tr. 128].

3. There Was No Error in the District Court's Refusing to Again Consider the Previously Determined Issue in Regard to Mitigation of Damages.

At the original trial the Appellant continually contended that the Appellee was under a duty to mitigate its damages and had failed in that duty. The court in its order denying Monolith's first motion for a new trial [R. 98-99], and its conclusions of law [R. 94] held that the plaintiff fulfilled any duty which it may have had to mitigate damages. This ruling was upheld on the first appeal, this Court stating: "Monolith claims that Douglas failed to mitigate its damages.

That was the burden of Monolith to prove. The trial court was evidently not satisfied with its proof." (303 F. 2d 176, 182). It would seem that nothing further need be said in this regard since this established the law of the case.

Monolith attempts to reopen this issue by asserting that the trial court's conclusion was reached on the basis of an inaccurate view of the time at which various defaulted quantities of oil should have been taken, and contending that Douglas could have and should have taken action to realize a greater amount from the defaulted oil in the earlier months. However, as the trial court stated in its opinion, "There was no clear-cut indication that the defendant definitely intended to breach the contract until March 10, 1958." [R. 76]. Thus, sofar as the question of mitigation is concerned, the situation was the same as that which the trial court considered at the original trial.

In any event, as this Court noted, the burden was upon Appellant to show facts disclosing a failure to mitigate damages, which in this instance would require a showing that there was a market available to Appellee for the defaulted oil, at the time it became in default and at a price in excess of the then prevailing market price. Appellant has failed to show any circumstances or means by which Appellee could have lessened the damages which it suffered. Further, the controlling statutory provision in regard to mitigation of damages is California Civil Code Section 1784(4) which in essence provides that if the buyer repudiates a contract or notifies a seller to proceed no further therewith, the buyer shall be liable "*for no greater damages*" than the seller would have suffered "*if he*

did nothing toward carrying out the contract" after receiving notice of the repudiation or countermand.

In this case the measure of damages adopted by the court, and ostensibly approved upon appeal, was the difference between the market value and the contract price at the time that each particular quantity of defaulted oil ought to have been taken, as provided by California Civil Code Section 1784(3). Thus it is quite apparent that no *greater* damages were awarded than those prescribed by the general rule established by that code section. If, as the record indicates, Appellee had ceased to manufacture fuel oil after determining that Appellant did definitely intend to repudiate the contract, this would have necessitated a shutdown of Appellee's refinery and would have resulted in enormously greater damages than those which have been awarded [R. 148].

As a matter of fact, the actual loss suffered by Appellee was some $18,000 greater than the amount of the original judgment and hence some $38,000 greater than the amount awarded by the revised judgment [Ex. 52]. In light of this evidence, it is difficult to understand the continued insistence by Appellant that in some manner Appellee received a nebulous "benefit of nonperformance" (Br. 37).

Finally, it may be said that the Appellate Court opinion indicated that it concurred with the trial court in adopting the statutory measure of damages and thus it can make no difference whether Douglas burned the oil (some of which it had to do because of the lack of any available market), or made no resale at all (See *Ventura Refining Co. v. Roseberg Oil Co.*, 82

Cal. App. 648, 653, 256 Pac. 434: ". . . a resale by the seller is not a necessary prerequisite to the maintenance of an action for damages in which the difference between the contract price and the market price is the measure of the detriment."), or resold the oil at less than the market or at more than the market. *Banks v. Pann,* 82 Cal. App. 20, 24, 254 Pac. 937, where it is stated:

> "Whatever may be contended with reference to the general rule that one is bound to use all reasonable means at hand to minimize his damage, it is rarely applied in cases of this sort where the measure of damages is provided by statute. Here the seller's damage was determined at the time of breach."

4. The Findings of the Trial Court Upon Which Its Computation of Damages Was Based, Are Fully Supported by the Evidence.

Findings of fact of the trial court are not to be set aside unless clearly erroneous (Rule 52(a)). Upon appeal the findings of the trial court, if supported or sustained by competent evidence, will not be interfered with or disturbed by the Appellate Court. (*De Lavall Steam Turbine Co. v. United States* (1931), 284 U. S. 61; *Memphis & CR Co. v. Pace* (1930), 282 U. S. 241; *Halsell v. Renfrow* (1906), 202 U. S. 287).

The necessary findings of both contract price and market price for the months of March, April and May were duly made by the court in its original findings and these findings were not vacated or disturbed in any manner on the first appeal. Hence the sufficiency of the evidence to support these findings cannot be now questioned.

The contract price (a delivered price) was established by the contract at a fixed figure subject to adjustment upward or downward in the same amount as any change in the posted price of Standard Oil Company for Bunker fuel at El Segundo, California and to similar adjustment with respect to changes in the specified transportation tariff which was set out in the contract. During the course of the contract there were two changes in the Standard Oil posting, each being in the amount of a 20 cent per barrel reduction, and occurring on January 10, 1958 and April 14, 1958 [Ex. 54]. The transportation factor set forth in the contract was deducted by the court from the contract price in arriving at the net f.o.b. refinery contract price. Appellant now questions the propriety of the court's determination in this respect, although it did not question the original findings as to contract price which were computed in the same manner. It now asserts, contrary to the position it took at the trial, that delivery of the product in Douglas equipment would have been more costly than the transportation factor set out in the contract, and hence, the net f.o.b. contract price should be less than the court had determined. The trial court, on conflicting evidence, found it unnecessary to resolve this issue as to actual transportation costs in Douglas equipment, and determined that the established tariff set out in the contract, which at least impliedly was agreed upon by the parties, was a proper transportation factor to be used in arriving at the net contract price. The contract price [as set out in Exhibit 63] apparently was considered as accurate by Appellant, since it used these figures in its illustrative computations in its Points and Authorities accompany-

ing its motion to reopen the case [Clk. Tr. 27]. Under the circumstances it cannot be considered that Appellant seriously questions the findings as to the contract price for the months prior to March, 1958.

The other factor for the determination of damages is the market value of the defaulted oil during the months of October-February. Extensive evidence was offered by Appellant with respect to the market value of oil during October and November, 1957, which evidence was summarized in defendant's Exhibit R-B. This summary showed an average of $2.77 per barrel for October and $2.74 per barrel for November. The court found the market value for these two months to be $2.75 per barrel. This finding is certainly supported by the evidence.

With respect to the months of December, 1957 and January and February, 1958 ample and sufficient evidence was introduced at the hearings during the original trial. A summary of this evidence is shown in Appellant's opening brief on the original appeal (page 12 of the appendix) which tabulation is, however, subject to the correction noted by Appellant in its brief on the original appeal (pp. 39-40). The findings of the court as to market value for these months are well above the lowest sales prices testified to, and, in regard to the defaulted oil for January and February (Monolith made no oil purchases from others in December), the market values found are even in excess of the prices at which the Appellant itself *actually purchased* substitute oil on the open market, as well as being greatly in excess of the price paid for the same oil by the broker, Mr. Hand, who purchased this oil and *resold*

it to Appellant [R. 435]. In view of this evidence, Appellant's claim that the findings have no support in the evidence is without any substance. It would appear that the most which can be claimed is that there appeared to be some conflict in the evidence as to market values, which was duly resolved by the trial court in its findings.

Appellant further urges that the "posted price" of Standard Oil Company of California should be entitled to great weight in determining market price and that there should be some presumption indulged that the relationship which they claim to have shown to exist during the months of October and November, 1957 between the "posted price" and market value "continues to exist as long as evidence to the contrary is not put forward." In view of the evidence of substantial sales by other producers at less than the "posted price" and the admission by Appellant's own purchasing agent that she obtained substitute oil at prices considerably below this "posted price" [Ex. W], there is in the record ample "evidence to the contrary." It might also be remarked that when the very contract in issue in this case was negotiated, there was a seller's market, as mentioned by this Court in its opinion, and yet the basic contract price was even then less than the "posted price." The efforts of Appellant to attempt to discredit the trial court's findings seem entitled to little notice in view of the fact that the findings were, as to the later months at least, in excess of the price at which Appellant actually purchased oil in substitution for the oil which it was obligated to purchase under the contract. In other words, during a portion of the

contract term, Appellant replaced the defaulted oil by purchases on the open market at prices lower than the market values found by the court for those periods of time.

Conclusion.

It is respectfully submitted that the revised judgment entered by the Court below was entirely in accord with the mandate of this court and that the same should be affirmed in all respects.

GOGGIN, TOLLEFSEN & BUMB,
By R. L. TOLLEFSEN,
ALLEN L. CLEVELAND, JR.,
Attorneys for Appellee.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

R. L. Tollefsen

No. 18665

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

IRVING SULMEYER, Trustee,

Appellant,

vs.

ARTHUR DONALD PFOHLMAN,

Appellee.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

Jurisdictional Basis.

This is an appeal from a final Judgment made and entered in the United States District Court for the Southern District of California, Central Division and this Appeal is prosecuted in accordance with the provisions of Rule 72 *et seq.* of the Federal Rules of Civil Procedure in the United States District Courts.

On June 15, 1961, Arthur Donald Pfohlman filed his Voluntary Petition in Bankruptcy.

On May 25, 1962, the Trustee, the Appellant herein, filed with Ray H. Kinnison, Referee in Bankruptcy, an Application to Determine Status of Real Property and Trustee's Title thereto, to Restrain a Superior Court Action and for a Temporary Restraining Order [Clk. Tr. p. 1].

On May 25, 1962, Ray H. Kinnison, Referee in Bankruptcy, issued an Order to Show Cause *re* Title to Real Property [Clk. Tr. p. 13].

On June 1, 1962, the respondent herein, Lois E. Pfohlman, wife of the bankrupt, filed a document entitled "Objection to Jurisdiction of Court" [Clk. Tr. p. 15].

On June 4, 1962, a hearing was held upon the Trustee's Application, and the Order to Show Cause issued thereon, and the Respondent's Objections to the Summary Jurisdiction of the Bankruptcy Court.

On June 6, 1962, Ray H. Kinnison, Referee in Bankruptcy, made and entered an order entitled "Order Overruling Objections to Summary Jurisdiction, Continuing Restraining Order and Submitting the Matter for Decision" [Clk. Tr. p. 29].

On July 9, 1962, the respondent, Lois E. Pfohlman, filed a document with the Clerk of the United States District Court for the Southern District of California, Central Division, entitled "Motion for Order Permitting Suit in State Court, Declaration in Support thereof and Points and Authorities" [Clk. Tr. p. 31].

On August 7, 1962, Ray H. Kinnison, Referee in Bankruptcy, filed a document entitled "Referee's Certificate on Review from Referee's Order, dated June 6, 1962" [Clk. Tr. p. 54].

On December 17, 1962, a hearing upon review was heard before the Honorable Pierson M. Hall, Judge of the United States District Court, Southern District of California, Central Division, on the basis of Points and Authorities submitted by both sides.

On February 25, 1963, the Honorable Pierson M. Hall, entered a document entitled "Order for Petition for Review" [Clk. Tr. p. 85].

On March 12, 1963, The Respondent lodged a document entitled Findings of Fact, Conclusions of Law and Order—Order on Petition for Review which document was entered by the court, March 13, 1963 [Clk. Tr. p. 93].

The Trustee thereupon filed a Notice of Appeal to the above entitled Court [Clk. Tr. p. 105].

Statement of the Case.

Arthur Donald Pfohlman, the bankrupt, filed a Voluntary Petition in Bankruptcy on June 15, 1961 and it was duly adjudicated a Bankrupt on said date.

Arthur Donald Pfohlman, and Lois E. Pfohlman, the respondent herein, are husband and wife, but Lois E. Pfohlman has not filed bankruptcy.

On the date of bankruptcy and all times hereafter, the bankrupt and his wife, Lois E. Pfohlman have resided on and are residing on a parcel of real property located at 2009 Seventh Street, La Verne, California.

The bankrupt has scheduled that parcel of real property in his Bankruptcy Schedules and failed to claim it as exempt. That on June 15, 1961, the date of bankruptcy, neither the bankrupt, nor his wife, had recorded a Declaration of Homestead, claiming said parcel exempt as their Homestead.

July 12, 1961 the Trustee filed his Report of Exempt Property, setting aside the exempt property claimed by the bankrupt, but making no mention of the real property.

On June 19, 1961, four days following the filing of the Voluntary Bankruptcy, the bankrupt and his wife,

filed a joint Declaration of Homestead, containing a defective description.

On July 20, 1961, the Trustee filed his Amended Report of Exempt Property, refusing to set aside as exempt the real property described, upon the grounds that the Homestead Declaration was recorded subsequent to bankruptcy and did not contain a legal description of the property belonging to the bankrupt and his wife.

On August 21, 1961, an abandonment of that Homestead was recorded in the official records of Los Angeles County.

On August 22, 1961, two months after filing the bankruptcy, the bankrupt and his wife executed a second joint Declaration of Homestead, with a proper description of the real property, which was recorded August 24, 1961 in the records of the Los Angeles County.

On May 17, 1962, the bankrupt and his wife filed an action in the Superior Court of the State of California to determine their interest in said real property and named the Trustee in Bankruptcy as defendant in that action. The State Court action was filed without prior permission being obtained from the Bankruptcy Court.

On May 25, 1962, the Trustee in Bankruptcy filed with the Referee in Bankruptcy the Application to determine the status of the real property and the Trustee's title thereto, and to restrain the Superior Court Action and for a Temporary Restraining Order [Clk. Tr. p. 1]. The Trustee contended in the Application that the property, while standing as a record joint

tenancy, was actually community property and passed to the Trustee by operation of law.

On May 25, 1962, an Order to Show Cause was issued by the Referee in Bankruptcy and was set for hearing on June 1, 1962. The respondent, Lois E. Pfohlman, filed a document entitled "Objections to the Jurisdiction of the Court" [Clk. Tr. p. 15].

On June 4, 1962, a hearing was held upon the Application and evidence was taken by the Referee. Following that hearing, the Referee overruled the objection of the respondent, Lois E. Pfohlman to the summary jurisdiction of the Court, submitted all matters for further consideration, and asked for both parties to submit Memorandums of Points and Authorities and entered a written order to that effect [Clk. Tr. p. 29] on June 6, 1962. It was from that order of June 6, 1962 that the respondent, Lois E. Pfohlman sought a review.

ARGUMENT.

POINT ONE.

The Motion for Order Permitting Suit in State Court, Declaration in Support Thereof and Points and Authorities Filed July 9, 1962 Was Neither Timely nor Proper as to Form.

The order appealed from overruling the respondent's objections of the summary jurisdiction of the Court was not an appealable order. Such an issue could have been determined by an appeal from the Order on the merits when made. Thus the appeal was premature.

Pearson v. Higgins, 34 F. 2d 27, 14 A. B. R. (N. S.) 386 (CCA 9 1929).

Not only was the appeal premature, but the motion for review filed with the United States District Court was defective for the following reasons: (a) the motion was filed more than 10 days after the entry of the order without any intervening extension of time being granted by the Referee; (b) the Motion was not filed with the Referee, but rather with the clerk of the United States District Court; (c) the form of the motion did not comply with either Section 39(c) of the Bankruptcy Act, nor with Local Rules of Bankruptcy, Southern District of California No. 204.

A. No extension was either sought or granted for the respondent's review of the order of the Referee entered June 6, 1962. The motion seeking to review that order was filed July 9, 1962, more than one month later. Section 39(c) of the Bankruptcy Act reads as follows:

> "A person aggrieved by an order of a Referee may, within ten days after the entry thereof or within such extended time as the court upon peti-

tion filed within such ten-day period may for cause shown allow, file with the Referee a petition for review of such order by a judge and serve a copy of such petition upon the adverse parties who were represented at the hearing. Such petition shall set forth the order complained of and the alleged errors in respect thereto. Unless the person aggrieved shall petition for review of such order within such ten-day period, or any extension thereof, the order of the referee shall become final. Upon application of any party in interest, the execution or enforcement of the order complained of may be suspended by the court upon such terms as will protect the rights of all parties in interest."

This section is generally exclusive and must be strictly followed; and any attempt to obtain review by certiorari, original petition, appeal, or other indirect process will be unavailing.

Collier on Bankruptcy, Vol. 2, Sec. 39.16, page 1479.

Section 39(c) was amended in 1960 to permit a review only if the application for it is filed within the ten day period or an extension thereof. Court should note that this differs from the Federal Rule 6(b)(1) for the United States District Courts, which usually permit a motion for an extension of time to be made after the expiration of the prescribed period.

Collier on Bankruptcy, Vol. 2, Sec. 3920 (4.1), page 1496.

In one of the few cases decided after the 1960 amendment, *In Re Watkins,* 197 F. Supp. 500 (WD Va. 1961), the court said:

> "There is no longer any inherent discretionary power in the District Judge to grant a petition for review after the ten-day period or any extension granted on a request made within such period has expired."

Therefore, under all available authority, it is clear that the Referee's order overruling the objections of the respondent to the summary jurisdiction of the court was final.

B. Secondly, the motion filed by the respondent was not filed with the Referee in Bankruptcy, but directly with the District Court. Unless a petition for review is filed with the Referee, the District Court has no authority to review the action of the Referee.

California State Board of Equalization v. Sampsell, 196 F. 2d 252 (1952);

In Re Russell, 105 Fed. 501, 5 A. B. R. 566 (DC Cal. 1900);

Collier on Bankruptcy, Vol. 2, Sec. 39.22, page 1501.

C. Thirdly, the motion filed July 9, 1962 conformed in no way with the requirements set forth in Section 39(c) of the Bankruptcy Act. It did not set forth the order complained of and the alleged errors in respect thereto, and was therefore defective.

Calif. State Board Equalization v. Sampsell (Supra);

Matter of Moskowitz, 63 F. Supp. 1000 (WD Ky. 1946).

POINT TWO.

The Bankruptcy Court Had Summary Jurisdiction to Determine the Extent of the Bankrupt's Interest in the Real Property Upon Which He Is Residing.

The bankrupt and his wife, Lois E. Pfohlman, the respondent herein, were both residing on the property on the date of bankruptcy. Where a controversy exists concerning property in the actual or constructive possession of the Bankruptcy Court, the Court may adjudicate summarily all rights and claims pertaining thereto.

Taubel-Scott-Kitzmiller Co. v. Fox, 264 U. S. 421, 432, 2 A. B. R. (N. S.) 912, 44 S. Ct. 396, 68 L. Ed. 770 (1924);

Magnolia Petroleum Co. v. Thompson, 106 F. 2d 217, 41 A. B. R. (N. S.) 88 (CCA 8 1939) rev'd on other grounds, *Thompson v. Magnolia Petroleum Co.,* 309 U. S. 478, 42 A. B. R. (N. S.) 216, 60 S. Ct. 628, 84 L. Ed. 876 (1940);

Schultz v. England, 106 F. 2d 764, 41 A. B. R. (N. S.) 249 (CCA 9 1939).

Constructive possession occurs where the property is in the physical possession of the Bankrupt at the time of the filing of the petition, but is not delivered by him to the Trustee.

Taubel-Scott-Kitzmiller Co. v. Fox (Supra);

In Re Rosser, 101 Fed. 562, 4 A. B. R. 153 (CCA 8 1900).

This rule applies even where the bankrupt's possession is not exclusive.

In Re Wegman Piano Co., 228 Fed. 60, 36 A. B. R. 210 (DC N. Y. 1915);

In Re Brooks, 91 Fed. 508, 1 A. B. R. 531 (DC Vt. 1899);

Remington on Bankruptcy, Vol. 5, Sec. 2145, page 285.

The major error in the District Court ruling and the central fallacy in the respondent's contentions, is that the Referee in Bankruptcy has no jurisdiction to determine the wife's interest in the realty, since she was in possession as a record joint tenant. However, the only test required is whether the *bankrupt* was in possession as a record joint tenant on the date of filing the petition. Since he was in possession, and still is, and since a joint tenancy deed amounts only to a rebuttable presumption as to the true status of the real property under the law of California (*Socol v. King,* 36 Cal. 2d 342, 223 P. 2d 627 (1950)), the Referee had summary jurisdiction to determine the true extent of the bankrupt's interest by authority of the decisions just cited.

POINT THREE.

The Referee in Bankruptcy Has Jurisdiction to Restrain the Respondent From Proceeding in a Plenary Suit Against the Trustee Filed Without First Obtaining Leave of the Bankruptcy Court Which Appointed the Trustee.

The respondent may not proceed against the Trustee without first obtaining leave of the court which appointed the Trustee, under the implied limitation contained in 28 U. S. Code 959(a). Since the State Court proceeding was simply a suit to quiet title to real property, and commenced without leave of the Bankruptcy Court, it was properly enjoined.

Vass v. Conron & Bros. Co., 59 F. 2d 969, 21 A. B. R. (N. S.) 546 (CCA 2 1932).

POINT FOUR.

The Referee in Bankruptcy Has Jurisdiction to Permanently Restrain the Respondent From Litigating Title to Real Property in a State Court Suit, Since the Bankruptcy Court Already Had Constructive Possession.

The Bankrupt was in possession of the realty on June 16, 1961, the day he filed his petition in bankruptcy, and thus the Bankruptcy Court gained constructive possession of the property.

Taubel-Scott-Kitzmiller v. Fox (supra);

In Re Rosser (Supra).

The State Court suit was not commenced until May 17, 1962 in an attempt to determine the Trustee's interest in the realty. Therefore, since the Bankruptcy

Court first acquired custody of the realty, it had exclusive jurisdiction.

Chicago RI. & PR. Co. v. Owatonna, 120 F. 2d 226, 46 A. B. R. (N. S.) 235 (C.A. Minn. 1941);

Remington on Bankruptcy, Vol. 5A, Sec. 2354, page 76.

Dated: 30th day of July, 1963.

RICHARD M. MONEYMAKER,
Attorney for Trustee.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

RICHARD M. MONEYMAKER

No. 18667

In the United States Court of Appeals for the Ninth Circuit

ELINOR E. PETERSEN, CAROL E. HECHE, 51.424 ACRES OF LAND IN THE CITY AND COUNTY OF SAN FRANCISCO, ETC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal From The United States District Court For The Northern District of California, Southern Division

MEMORANDUM FOR THE UNITED STATES

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ELINOR E. PETERSEN, CAROL E. HECHE, 51.424 ACRES OF LAND IN THE CITY AND COUNTY OF SAN FRANCISCO, ETC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

**Appeal From The United States District Court
For The Northern District of California,
Southern Division**

MEMORANDUM FOR THE UNITED STATES

INTEREST OF THE UNITED STATES

The appellants herein are seeking to establish themselves as the owners of lands, title to which was acquired by the United States by virtue of its having filed a declaration of taking in condemnation on February 27, 1956. This is basically a controversy between the appellants and the State of California, which also claimed title to the subject lands, over

the distribution to be made of compensation which the United States must pay for the property which it has taken.

The right of the United States to take the subject land is not challenged. Ordinarily, the United States has no interest in title disputes and takes no position concerning them. In this instance, however, the appellants are claiming title to the subject lands by virtue of a United States patent. The interpretation of this patent is of concern to the United States, as the title to considerable property would be affected if the appellants' claim of title were upheld. In addition, appellants have now advanced an argument based upon actions of the United States after condemnation in which it has a direct interest.

For this reason, we are filing this memorandum outlining the United States' position concerning the effect of its patent, which was issued pursuant to Section 13 of the Act of March 3, 1851, 9 Stat. 631.

STATEMENT

The lands in question are in the area acquired as a result of the Mexican War by the Treaty of Guadalupe Hidalgo, February 2, 1848, 9 Stat. 922, which guaranteed the property rights of Mexicans in the annexed territory. Under the treaty provisions and the general law of nations, the land titles of individuals within the ceded territory were protected. However, the number of claimants and the type of Spanish and Mexican grants were many and varied. Land owned by the Mexican government and lands

as to which no valid private claim could be established belonged to the United States. These facts required some procedure for ascertaining the validity and the boundaries of the private claims in order to set apart the lands privately owned from those which belonged to the United States. To accomplish this, Congress passed the Act of March 3, 1851, 9 Stat. 631, entitled "An act to ascertain and settle the private land claims in the State of California." This Act established a Board of Land Commissioners with authority, upon petition of those claiming under Mexican or Spanish grants of land in the annexed territory, to pass upon the validity of the grants. Right to a review of the Board's determination by the district court and the Supreme Court of the United States was allowed the claimants and the Government.

The United States, in 1874, issued the patent here involved to Antonio Peralta, through which the appellants claim title. Prior to the issuance of this patent, the claim of Antonio Peralta had been presented to the commissioners appointed to ascertain and settle private land claims in the State of California. This commission considered the evidence produced and found that the claim to the place called San Antonio was valid to the whole extent of its bounds. This determination was appealed to the United States District Court for the Northern District of California. From the decree of the district court, the United States appealed to the Supreme Court of the United States, which affirmed the de-

cison of the lower court. *United States* v. *Peralta et al.*, 19 How. 343, 349 (1856).

When these condemnation proceedings were instituted, the lands in question were submerged, underlying San Francisco Bay. The appellants' position in the district court was that the Spanish grant to Don Luis Peralta placed the western boundary of the Rancho San Antonio as the sea and that, under the Spanish law, this runs to the deepest part of the sea. The district court ruled that the appellants' title had been presented to commissioners pursuant to the Act of March 3, 1851, and confirmed by the District Court for the Northern District of California, and that no title to land in California depending on Spanish or Mexican grants could be of any validity unless submitted to and confirmed by the Board, citing *Botiller* v. *Dominguez*, 130 U.S. 238 (1888). The court further held that a United States patent is the final act in proceedings instituted for the confirmation of a claim and that it is a record which, while it stands, binds both the Government and the claimant and cannot be attacked by either party except by direct proceedings instituted for that purpose.

The court concluded that the United States' patent which was issued to Antonio Peralta is the only evidence of the extent of the grant and that the boundary is clearly drawn in the patent at the ordinary high water mark. The court also held that the land in issue lies beyond the ordinary high water mark and had become vested in the State of California.

ARGUMENT

The appellants here specify a great number of matters as errors (Br. 28-38). Primarily, these are argumentative statements which have no bearing on the issue before this Court. The appellants argue that the lands to which they are claiming title are now located above the line of ordinary high tide of the Bay of San Francisco (Br. 35(h)), and that the only land excluded from the United States' patent under which they claim title is that land which is covered by the tides (Br. 36). The appellants maintain that their rights began when the lands became filled and above the ordinary high water mark (Br. 12).

The appellants ask this Court to rule, among other things, that the appellants are "* * * the owners in fee of all of the filled lands, formerly tide lands on the Island of Alameda, that are above the line of ordinary high tide of the Bay of San Francisco * * *," that "* * * the State of California is subject to the prior Spanish Land Grant of 1820 of the Rancho San Antonio to Don Luis Peralta and has no vested interest by virtue of its sovereignty in the tide lands within the Rancho San Antonio and on the Island of Alameda * * *," and that "* * * the State of California * * * has no vested interest, * * * in the filled lands within the Rancho San Antonio * * * above the line of ordinary high tide of the Bay of San Francisco, * * *" (Br. 54-55).

I

THE FACT THAT AFTER THE TAKING THE UNITED STATES FILLED SUBMERGED LANDS IS IRRELEVANT TO THE PRESENT ISSUE

As we have just noted, appellants' arguments to this are in very large measure based on the claim that after the taking the United States filled the submerged lands for its purposes and that now the disputed area is fast land. That fact is plainly irrelevant here. Upon filing of the declaration of taking, title vested in the United States, and the Declaration of Taking Act provides that at that time "the right to just compensation for the same shall vest in the persons entitled thereto; * * *." Act of February 26, 1931, 46 Stat. 1421, 40 U.S.C. sec. 258a. Subsequent developments have no bearing on determining who is entitled to compensation. *United States* v. *Dow*, 357 U.S. 17 (1958).[1] This is the answer to appellants' present contention. However, we shall now show the reason the district court was correct in its ruling.

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[1] Mere artificial fill does not change title. *City of Newport Beach* v. *Fager*, 39 Cal.App.2d 23, 102 P.2d 438, 442 (1940); *City of Los Angeles* v. *Anderson*, 206 Cal. 662, 275 Pac. 789, 791 (1929); see also *United States* v. *Turner*, 175 F.2d 644, 647 (C.A. 5, 1949), cert. den., 338 U.S. 851; and *Barney* v. *Keokuk*, 94 U.S. 324 (1877), where an upland owner obtained no title to land which was filled by a city.

II

APPELLANTS DID NOT OWN THE LANDS IN QUESTION AT THE DATE OF TAKING

A. *The patent issued by the United States is the only evidence which can be considered in determining the extent of the appellants' claim of title.*—"* * * there can be no doubt of the proposition, that no title to land in California, dependent upon Spanish or Mexican grants can be of any validity which has not been submitted to and confirmed by the board provided for that purpose in the act of 1851; or, if rejected by that board, confirmed by the District or Supreme Court of the United States." *Botiller* v. *Dominguez*, 130 U.S. 238, 255-256 (1889).

By the Act of March 3, 1851, 9 Stat. 631, the United States has declared the conditions under which it would discharge its political obligations to Mexican and Spanish grantees. It is required in Section 13 of this Act that all private land claims be presented within two years from its date and it is declared, in effect, that if, upon such presentation, they are found by the tribunal created for their consideration and by the courts on appeal to be valid, it will recognize and confirm them, and take such action as will result in rendering them perfect titles. But it has also declared by the same Act that, if the claims are not presented within the period prescribed, it will not recognize or confirm them and the claimed land will be considered as a part of the public domain.

In *Beard* v. *Federy*, 3 Wall. 478, 492 (1865), the court stated that "By the act of March 3d, 1851, they [the United States] have declared the manner and the terms on which they will discharge this obligation. * * * When informed, by the action of its tribunals and officers, that a claim asserted is valid and entitled to recognition, the government acts, and issues its patent to the claimant. This instrument is, therefore, record evidence of the action of the government upon the title of the claimant."

The descriptions of the land which are contained in the original Spanish Land Grant and the succeeding proceedings relating to the validity of the claim are of no effect in this condemnation proceeding as the patent alone governs what land the United States recognized as a valid claim. *Dominguez De Guyer* v. *Banning*, 167 U.S. 723 (1897), stated at page 740 that "* * * a patent issued avowedly in execution of such decree [under the Act of 1851] was conclusive between the United States and the claimants, and, until cancelled, it alone determines * * * the location of lands that passed under the decree."

B. *The patent issued by the United States gave no rights to the appellants to lands below the ordinary high water mark.*—The court below found that "The patent clearly draws the line at *ordinary high water mark*, and it will not be presumed that the government intended to convey beyond the ordinary high water mark" (Order Dismissing Claims of Elinor E. Petersen and Carol E. Heche, p. 7 of Appendix of Appellee, State of California).

"It is equally well settled that a grant from the sovereign of land bounded by the sea, or by any navigable tide water, does not pass any title below high water mark, unless either the language of the grant, or long usage under it, clearly indicates that such was the intention. [Citations omitted.]" *Shively* v. *Bowlby*, 152 U.S. 1, 13 (1894). See also *Los Angeles* v. *San Pedro*, 182 Cal. 652, 189 Pac. 449 (1920), cert. den., 254 U.S. 636. The Supreme Court in *United States* v. *Pacheco*, 2 Wall. 587, 590 (1864), affirming a decree of the district court conferring a claim to land under a Mexican grant in California along the Bay of San Francisco, stated that "When, therefore, the sea, or a bay, is named as a boundary, the line of ordinary high-water mark is always intended where the common law prevails. [Footnote omitted.]" See also *United States* v. *Stewart*, 121 F. 2d 705 (C.A. 9, 1941).

C. *Title to tidelands not previously patented by the United States inured to the State of California on its admission to the Union.*—In *Knight* v. *U. S. Land Association*, 142 U.S. 161, 183 (1891), the Supreme Court held that "Upon the acquisition of the territory from Mexico the United States acquired the title to the tide lands equally with the title to the upland; but with respect to the former they held it only in trust for the future States that might be erected out of such territorty."

Upon the admission of California as a state in the Union, it acquired a qualified title to lands within its boundaries under navigable waters, such as rivers,

harbors and tidelands, which had not previously been validly conveyed. *United States* v. *California*, 332 U.S. 19, 30 (1947). In *Weber* v. *Harbor Commissioners*, 18 Wall. 57, 65-66 (1873), the Court stated that "Although the title to the soil under the tidewaters of the bay was acquired by the United States by cession from Mexico, equally with the title to the upland, they held it only in trust for the future State. Upon the admission of California into the Union upon equal footing with the original States, absolute property in, and dominion and sovereignty over, all soils under the tidewaters within her limits passed to the State, with the consequent right to dispose of the title to any part * * *."

CONCLUSION

The patent granted by the United States to the appellants' predecessors in interest clearly draws the boundary line of the Rancho San Antonio at the ordinary high water mark. The lands within the Bay of San Francisco lying below this line not having been previously conveyed belonged to the State of California prior to the filing of the declaration of taking by the United States. The court below properly dismissed the claims of the appellants to any land lying below this line.

The judgment below should be affirmed.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ELINOR E. PETERSEN; CAROL E. HECHE; and 51.424 acres of land, more or less, in the City and County of San Francisco, State of California, et al.,	
Defendants and Appellants,	
v.	NO. 18667
UNITED STATES OF AMERICA,	
Plaintiff,	
and	
STATE OF CALIFORNIA,	
Appellee.	

BRIEF OF APPELLEE, STATE OF CALIFORNIA

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ELINOR E. PETERSEN; CAROL E. HECHE; and 51.424 acres of land, more or less, in the City and County of San Francisco, State of California, et al., Defendants and Appellants, v. UNITED STATES OF AMERICA, Plaintiff, and STATE OF CALIFORNIA, Appellee.	NO. 18667

BRIEF OF APPELLEE, STATE OF CALIFORNIA

STATEMENT OF PLEADINGS AND FACTS DISCLOSING BASIS OF JURISDICTION OF A FEDERAL COURT

This is an action in eminent domain by the United States of America for property located in the State of California. The complaint in condemnation is filed pursuant to the Acts of Congress approved August 1, 1888 (25 Stats. 357); July 15, 1955 (Public Law 161, 84th Congress), and August 4, 1955 (Public Law 219, 84th Congress). Order for delivery of possession of the property condemned was made by the United States District Court on February 27, 1956.

STATEMENT OF CASE

Appellee, State of California, claims that, prior to the declaration of taking by the United States, the State of California was the owner of the property condemned and as such is entitled to the appropriate compensation for the taking. Appellants have appeared in this action and contend they are the owners of the property and thus are entitled to compensation for the taking.

The property, at the time of the taking, was submerged land lying in a described area situated between the pierhead line of Oakland-Alameda and the boundary line of the City and County of San Francisco. (T p. 3; 6; 10; 17; 20; 23) The position of the land may, therefore, be characterized roughly as lying in the middle of San Francisco Bay. (T p. 26: 30-32; 27:1-7)

California claims title to this land by virtue of sovereignty. Appellants claim title through a Spanish and Mexican grant known as the "Peralta Grant". (T 40:20-28; 43:19-27)

ARGUMENT

I

THE PERALTA GRANT IS A CONFIRMED GRANT, BUT AS CONFIRMED DOES NOT INCLUDE THE LANDS IN QUESTION

Prior to September 9, 1850, the subject lands were submerged lands covered by the waters of the Bay of San Francisco. On that date California was admitted into and became a member of the Union of States upon an equal footing with the original States, in all respects, and by reason of that fact acquired title to all tide and submerged lands located within the State of California, not validly conveyed prior to the admission of California. Land in the Bay rejected to a private claimant of a Mexican title, automatically vested title in the sovereign, the State of California.

U.S. v. Mission Rock Co., 189 US 391, 400-401 (and cases therein cited); (47 L.ed 865; 23 Sup.Ct. 606) (1902));

U.S. v. Pacheco, 69 US 587, 590 (2 Wall.) 17 L.ed 865 (1864));

Donnelly v. U.S., 228 US 243, 262; (57 L.ed 820; 33 Sup.Ct. 449 (1913));

U.S. v. Calif., 332 US 19 (91 L.ed 1414; 36 Sup.Ct. 1658) (1947));

Borax Consolidated, Ltd. v. Los Angeles, 296 US 10; (80 L.ed 9 56 Sup.Ct. 23) (1935)).

Under the Treaty of Guadalupe Hidalgo (9 Stats. 922) and particularly by reason of the rejection by the Congress of the originally proposed Article X thereof, Congress did not elect to

automatically recognize Mexican or Spanish land titles in the territory of the treaty. In lieu thereof the United States agreed to recognize titles it confirmed and it set up confirmation machinery by an Act of Congress dated March 3, 1851 entitled "An Act to ascertain and settle the private land claims in the State of California". (9 Stats. 631) Under the statute of confirmation, a private land owner, who elected to perfect title to lands in California, might enjoy those lands provided he complied with the terms of the statute. The statute required all claims to the land be presented within two years from the date of the Act, and in the event the Commission found the claim under Mexican law valid, the United States would confirm title by issuance of patent.

Land titles so recognized vested in the private claimant; land titles rejected reverted to the public domain.

Watriss v. Reed, 99 Cal. 134; (33 Pac. 775) (1893));

McGary v. Hastings, 39 Cal. 360; (13 Pac. 360) (1870));

Bascomb v. Davis, 56 Cal. 152; (19 Pac. 152) (1880)).

It is the patent of the United States that affords title to land in California; not the Spanish or Mexican grants.

Botiller v. Dominguez, 130 US 238; (32 L.ed 926; 9 Sup. Ct. 525 (1888).

In that case the court states:

> " . . . But we are quite satisfied that upon principle, as we have attempted to show, there can be no doubt of the proposition, that no title to land in California, dependent upon Spanish or Mexican grants can be of any validity which has not been submitted to and confirmed by the board provided for that purpose in the act of

1851; or, if rejected by that board, confirmed by the District or Supreme Court of the United States." (p. 255, 256)

Appellants' predecessor in title recognized the procedure and machinery for perfection of his Spanish and Mexican grants. Peralta and his sons made a timely appearance before the Commissioners and set up claim to title in actions Nos. 98, 99 and 100 in the District Court. Appellants concede their claim to title flows from Antonio Maria Peralta. (Apps' Br. p. 8) The patent, which appellants contend establishes their claim of title, is recorded in Book A of Patents, page 648 et seq. in the Alameda County Recorder's office of the State of California.[1] Appellants agree this is the patent from which their claim flows. (Apps' Br. p. 19) The patent itself conclusively establishes, as a matter of law, the invalidity of appellants' claim of title to the lands which are the subject of the condemnation. Transcript volume 3, pages 9 to 10 recite the actual field notes describing the land in the patent. (Ex. F, p. 669) The description of the patented land is a description of the mean high tide line in the Bay as it existed when California was admitted into the Union. Commencing on the bottom of Exhibit F page 664 it reads: " . . . Thence meandering along the shore of the Bay of San Antonio at the line of

1. This patent is designated as part of the record on appeal and is Exhibit F before this court. References will be made to this Exhibit and the page numbers which are generally in upper right hand corner of the Exhibit.

ordinary high water . . ." On page 666 the patent goes on " . . . thence meandering along the Bay of San Francisco at the line of ordinary high tide . . . ." The points and stations and the description contained in this patent, in so far as this boundary is concerned, run along the line of mean high tide. The lands which are the subject of this condemnation, lie some two miles bayward of the original shore line.

This court will take judicial notice of geographical positions.

The Apollon, 22 US 362; (6 L.ed 111) (1824);

McNitt v. Turner, 83 US 352;(21 L.ed 341) (1872));

Greeson v. Imperial Irrigation District, 59 Fed.2d 529; affirming 55 Fed.2d 321 (1932);

Law v. Smith, 288 Fed. 7 (1923).

Judge Zirpoli, in his Order Dismissing Claims of Elinor E. Petersen and Carol E. Heche, has clearly and concisely delineated the facts before him and the conclusions of law applicable thereto. We have taken the liberty of incorporating this order as an Appendix. The Order specifically finds the lands in question lie beyond the ordinary high water mark. Thus it is conclusive appellants have no valid claim of title to the lands in question. The entire problem involved in this appeal is just that simple.

II

APPELLANTS' CLAIM, EVEN UNDER THEIR THEORY, IS NOT VALID

Appellants recognize themselves in privity with Antonio Maria Peralta and his patent to the extent that they trace their chain of title to him but decline to recognize themselves in privity where the Peralta claims were resolved against them. The District Court in action No. 100 commenced the confirmation of the Peralta title in 1852. It concluded that litigation approximately twenty years later in 1874. This was in fact a trial de novo of the proceedings of the Board of Land Commissioners. (U.S.v. Billings, 69 US 444 (2Wall.)(17 L.ed 848) One of the points in the federal court litigation was the determination of the bayward boundary of the Peralta Grant. The court determined that boundary in that action and companion actions 98 and 99. The Supreme Court heard a portion of the claim in 1856. In U.S.v. Peralta, 60 US 343 (19 How.) (15 L.ed 678) (1856)) the Supreme Court affirmed the decree of the Circuit Court, which found the original conveyances valid to establish a claim of title and it also determined the northern boundary of the Peralta Grant. The only language in the decision on the bayward boundary is the recitation of the decree of the District Court that the boundary was " . . . the said bay of San Francisco, from the mouth of the said deep creek of San Leandro up to the beginning of the said line, which has been described as the northern boundary of said

tract, which line along the bay constitutes its western boundary . . . ." (p.344)

The patent itself recites the many steps taken prior to its issuance. It shows Antonio Maria Peralta came before the court in 1852 for the purpose of having the Commissioners confirm title to his claim founded on a Spanish Grant to Louis Peralta by Don Pablo Vicente de Sola, Military Governor of California. In 1857 United States District Judge Hoffman entered a decree establishing the Bay as the western boundary of the grant. After reciting a number of the other proceedings which took place to establish the boundaries of the claim, the patent finally recites that on September 21, 1865 the court entered its final decree which excluded from the survey " . . . the lands which are conveyed (covered) by those tides which happen between the full and change of the Moon twice in twenty-four hours and that said Survey be in all other respects approved. And it is further Ordered that the Surveyor General of the United States for the State of California caused said Survey to be modified as herein directed so soon as practicable and return into this Court a plat of the same for its approval . . . ." The decree and the patent itself then go on to confirm the description found in the field notes, leaving no doubt of the bayward boundary. (Ex.F)

The determination of the bayward boundary at mean high tide was in keeping with the procedure ordinarily followed in confirming Mexican grants. In Los Angeles v. San Pedro,

182 Cal. 652; (189 Pac. 449; 254 US 636; 65 L.ed. 480; 41 Sup.Ct. 9) (1920)), the court in discussing the rules of interpretation with respect to confirmed patents, said:

> "The first is that a patent should ordinarily be constued as excluding therefrom land below the high-tide line. The rule is thus stated in Wright v. Seymour, 69 Cal. 122, 126 (10 Pac. 323): 'The lands under water where the tide ebbs and flows belong to the state by virtue of her sovereignty, and in the absence of an express showing to the contrary it will not be presumed that the government of the United States intended to convey it . . . We must assume that the government discharged its obligation to the holder of the Mexican title by receiving proof of its character and the land to which it related, and that upon confirmation the patent issued to the claimant is the evidence and only evidence of the extent of the grant, and the terms used in such patent relating to extent and boundaries are subject to like rules of construction with other grants from the government. Had the government found the claimant entitled to the bed and banks of a tide-water stream, we must suppose it would have used in the patent apt words for its conveyance. Not having done so, the presumption is, that it was not intended to convey the bed of the stream.' It is equally well settled that a grant from the sovereign of land bounded by the sea or by any navigable tide water does not pass any title below high-water mark unless either the language of the grant or long usage under it clearly indicates that such was the intention." (p. 654)

See also: California Civil Code section 830;

Anderson v. Trotter, 213 Cal. 414, 420; (2 Pac. 2373 (1931))

Whether the United States correctly or incorrectly determined the boundary of the original grant in its issuance of the patent can have no effect on the outcome of this litigation or any other litigation involving appellants. Clearly appellants are limited to a claim of title under the patent.

We mention, only as a matter of academic interest,

the District Court in action No. 100 was correct in its confirmation of the land title to the line of mean high tide and not to the "deepest part of the sea"; that unknown place to which appellants claim title. (See: Steward v. United States, 316 US 354, 359-360; (86 L.ed 1529; 62 Sup. Ct. 1154) (1942))

Mexican Grants commonly described boundaries in such fashion but, unlike English law, a Spanish grant couched in such language delivered only an inchoate title. The procedure by which perfect title was vested is ably described by Chief Justice Field in the case of Leese v. Clark, 18 Cal. 535 (1861). At page 574 the court says:

> "When the grant to Leese and Vallejo passed from the Governor and was received by them, there still remained another proceeding to be taken for the investiture of a complete title. The proceeding was a judicial delivery of the possession. Under the Mexican system this proceeding was an essential ceremony where there was any uncertainty as to the precise bounds of the land granted. That there was such uncertainty in the bounds of the tract, as described in the grant in question, is manifest. The location of the line running from the desembarcadero, or landing place, to the playita, or little beach, is one source of uncertainty. That line might be run in several different directions, materially varying from each other, and yet run in each instance in a northerly course from the starting point. There are other sources of equal uncertainty. A delivery of judicial possession was therefore necessary. This proceeding involved a definite ascertainment of the land to be delivered, and for that purpose required a survey and measurement - in other words, a location of the land. The power of locating the land, as preliminary to its formal delivery, belonged to the Government, and could not be exercised by the grantees, at least so as to bind the Government. They took with full knowledge of the right and

power of the former Government in this respect, and in strict subordination to them. It does not appear from the record whether that Government ever acted in the matter. Assuming that it did not, the right and power passed to the United States, and could be exercised by them in such manner and at such time as they might deem expedient. The defendants, as junior grantees, took their grants with this knowledge: - that if the military occupation of the country ceased, and the displaced Mexican authorities were restored, they would only take, if in that event they were allowed to take at all, in subordination to the action of those authorities in the location of the elder grant; and that if the United States permanently retained possession of the country, they would take in subordination to like action of the new Government. By the Act of March 3d, 1851, the new Government designated the manner and conditions under which the right and power of location would be exercised, and declared the effect which should be given to the proceedings had. The defendants, taking whatever interest they may possess in subordination to the future action of the Government, old or new, in determining the location of the elder grant, are in no position to question those proceedings. As the Government acted in this matter only through its appointed tribunals and officers, if it shall discover that imposition and fraud have been practiced upon them, and have produced a result which otherwise would not have been obtained, it may itself institute proceedings to vacate the confirmation and patent, and annul or correct the location. But unless the Government interferes in the matter, the defendants, as junior grantees, are remediless. Their title to the premises was not such at the date of the treaty as to enable them to resist the action of the Government in the location of the elder grant . . . ." (Underlining by the court)

See also: Carpentier v. Montgomery, 80 US 480 (13 Wall.); (2 L.ed. 698) (1872)

CONCLUSION

The judgment of the trial court should be affirmed.

Respectfully submitted,

STANLEY MOSK, Attorney General
of the State of California

MIRIAM E. WOLFF
Miriam E. Wolff
Deputy Attorney General

CERTIFICATE OF ATTORNEY RESPONSIBLE FOR THE PREPARATION OF THIS BRIEF

I certify that I am one of the attorneys responsible for the preparation of this brief; that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion the foregoing brief is in full compliance with those rules.

MIRIAM E. WOLFF
Miriam E. Wolff
Deputy Attorney General

A P P E N D I X

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. 51.424 ACRES OF LAND, MORE OR LESS, IN THE CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA, et al., Defendants.	NO. 35276

ORDER DISMISSING CLAIMS OF ELINOR E. PETERSEN AND CAROL E. HECHE

This is a condemnation of lands proceeding instituted by the United States of America affecting 51.424 acres of land situate under the water of the Bay of San Francisco, just off the Alameda coast. The only claimants to the land are the State of California and Elinor E. Petersen and Carol E. Heche.

The Court now has before it for consideration and determination the motion of Elinor E. Petersen and Carol E. Heche for judgment in their favor, establishing Elinor E. Petersen and Carol E. Heche to be the present lawful owners of said land.

Elinor E. Petersen and Carol E. Heche, hereinafter referred to as claimants, claim title to the land involved

in this litigation through a chain of title dating back to 1820, when the Spanish government granted the Rancho San Antonio to Don Luis Peralta. The sons of Don Luis Peralta succeeded to their father's interest. In 1851, Antonio Peralta, one of the sons, conveyed all of his interest in the Encinal, now the Island of Alameda, to William W. Chipman and Gideon Aughenbaugh by deed dated October 22, 1851. Claimants trace their title to these grantees.

In describing the boundaries in the original 1820 grant, the land was described as bounded on the southwest by the sea.

The claim to Rancho San Antonio was presented to the Commissioners in 1852, pursuant to the March 3, 1851 Act to Ascertain and Settle the Private Land Claims in the State of California by Antonio Peralta. It appears Don Luis Peralta had a perfect title to this property prior to presentation of the claim. The District Court for the Northern District of California confirmed title in 1857 to Rancho San Antonio to the fullest extent of its bounds. The confirmation decree described the western boundary as a line along the bay. The Court further approved a partition agreement between the Peralta brothers. The Encinal was partitioned to Antonio Peralta.

The Court then proceeded to locate the lands by directing an official survey in accordance with the 1851 Act. In 1863, the survey was returned, and objections to the survey

were made by certain persons to the including in the survey tide lands lying within the corporate limits of the City of Oakland. The Court sustained the objection and directed the surveyor to cause said survey to be corrected and exclude from the survey and "from the lands confirmed the waters of the Bay of San Francisco and of the Arms thereof and the lands covered thereby as far as the tides flow at the full and change of the moon."

In 1865, the Court in the same cause vacated its 1863 decree and ordered that "the survey of that part of the Rancho San Antonio confirmed to the said Antonio Peralta the field notes of which were approved by E. F. Beale United States Surveyor General on the 28th day of February 1863 be modified so as to exclude therefrom only the lands which are conveyed (?) by those tides which happen between the full and change of the moon twice in twenty four hours and that said Survey be in all other respects approved."

In 1874, the United States Government issued its patent to Antonio Peralta. The patent contains a complete description of the Rancho San Antonio, together with the decrees of Court and the official survey, the survey having been approved by the Court October 4, 1871.

Claimants' position is that the Spanish grant to Don Luis Peralta places the western boundary as the sea, and that under Spanish law they take to the deepest part of the sea. To sustain their position, the Court would have to conclude that

since Peralta had a perfect title under the Spanish grant, it was not necessary to receive a confirmation of title under the 1851 Act, and that for this reason, they can look to the boundaries established by the Peralta grant. However, this is not the law, for absence of a confirmation of title under the Act of 1851 vests title in the sovereign. To sustain claimants' position, the Court would have to further conclude that while claimants may be bound by the decree of confirmation rendered in 1857, they are not bound by the survey contained in the patent, and that they can go behind the patent to establish their claim. Again, this is not the law. See Chipley v. Farris, 45 C 527 (1873).

In construing the federal act requiring confirmation of land titles, it was first believed by the California courts that it applied only to inchoate, imperfect titles, and that persons whose titles were perfect at the time of the acquisition of California by the United States were not compelled to submit them for confirmation to the Board of Land Commissioners. Minturn v. Brower, 24 C 644 (1864). The Supreme Court of the United States, however, determined the question by saying that there was no distinction between claims derived from Spain or Mexico that were perfect under the laws of those governments and those that were incipient, imperfect, or inchoate, and that, therefore, no title to land in California depending on Spanish or Mexican grants could be of any validity unless it was submitted to and confirmed by the Board. Botiler v. Dominquez,

130 U.S. 238 (1888). Thus, in order to perfect title in claimants' predecessors, it was necessary that someone in privity with them receive confirmation of the land title under the Act. This was done by Antonio Peralta.

In Chipley v. Farris, supra, a case falling under the 1851 Act, it was contended by the plaintiff that the survey, which was incorporated in the patent, did not accord with the decree of confirmation, and that they were entitled to rely upon the decree, which was also incorporated in the patent, for title to lands within the decree, but not within the survey. The Court held that the patent purports to convey the lands described in the survey and its scope cannot be extended, nor limited, by showing that the decree comprised a greater or less area than the survey. The court points out that a patent issued under the Act of 1851 is the final act in proceedings instituted for the confirmation of the claim of the patentee to land which had been granted by the former government, and for segregation of such land from the public lands of the United States; and it is a record which binds both the government and the claimant, and cannot be attacked by either party, except by direct proceedings instituted for that purpose. While it stands, the claimant, or those deriving title through him, will not be permitted to aver that the claim comprised other or different lands from those mentioned in the patent.

In Wright v. Seymour, 69 C 122 (1886), a claim very similar to the instant claim was made. The question was

whether the land of plaintiff extended to the thread of the stream or bounded by a line at high water mark on the Russian River. The Court, in holding that the land extended only to high water mark, said, in part:

> "The contention of appellant, that his title is derived from the government of Mexico, that the patent from the United States government was simply a confirmation of pre-existing rights under the grant, that at the date of the grant the common law did not exist as a rule of action or decision in California, and consequently, that none of the rights of the patentee conferred by the preceding sovereignty can be divested, is substantially correct.
>
> "But the question remains, what were those rights?
>
> "When we answer this question, in the light of the evidence presented by appellant through the patent of his grantor, we are constrained to say that he has failed to show any right to the land in question . . . .
>
> "We must assume that the government discharged its obligation to the holder of the Mexican title by receiving proof of its character and the land to which it related, and that upon confirmation the patent issued to the claimant is the evidence and only evidence of the extent of the grant, and the terms used in such patent relating to extent and boundaries are subject to like rules of construction with other grants from the government.
>
> "Had the government found the claimant entitled to the bed and banks of a tide-water stream, we must suppose it would have used apt words for its conveyance. Not having done so, the presumption is, that it was not intended to convey the bed of the stream."

The Court, in the Wright case, also confirmed the rule that lands under water where the tide ebbs and flows belong to the state by virtue of her sovereignty, and in

the absence of an express showing to the contrary, it will not be presumed that the government of the United States intended to convey it. See also United States v. Stewart (1941) 121 F. 2d, 705, 710 (9Cir.).

All claimants rely upon the patent issued to Antonio Peralta. The Court concludes that the patent issued to Antonio Peralta is the only evidence of the extent of the grant and claimants are bound by the patent and the survey contained therein. The patent clearly draws the line at ordinary high water mark, and it will not be presumed that the government intended to convey beyond the ordinary high water mark.

The land in question lies beyond the ordinary high water mark, and hence, title thereto did not pass to Antonio Peralta, his sons or their successors in interest and became vested in the State of California.

The claims of Elinor E. Petersen and Carol E. Heche are therefore invalid and are hence dismissed. Present judgment accordingly. The case is remanded to the Calendar Judge for setting for trial.

Dated: December 18, 1962.

ALFONSO J. ZIRPOLI
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GLENN ROSE, Appellant vs. FRED R. DICKSON, Appellee	No. 18670

BRIEF OF APPELLEE

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GLENN ROSE, Appellant vs. FRED R. DICKSON, Appellee	No. 18670

BRIEF OF APPELLEE

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UNITED STATES COURT OF APPEALS

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BRIEF OF APPELLEE

Jurisdiction

The jurisdiction of this Court is conferred by title 28, U.S.C. section 2253.

Statement of the Case

Proceedings in the State Courts

On April 25, 1958, in the Superior Court of Alameda County, a three-count information was filed charging petitioner and appellant,[1/] Glenn Rose, with (1) kidnapping, in violation of section 207 of the California Penal Code; (2) aggravated assault, in vio-

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[1/] Hereinafter referred to as petitioner.

lation of section 245 of the Penal Code; and (3) sex perversion, in violation of section 288a of the Penal Code (CT 1-2[2/]).

On May 8, 1958, petitioner appeared in the Superior Court with his privately retained attorney, Gartner Thomas, Esq., pleaded "not guilty" to each of the three counts, and waived his right to be tried within sixty days from the filing of the information (CT 3).

On June 9, 1958, the matter was called for trial. With the consent of petitioner and on the motion of his attorney, the "not guilty" pleas were withdrawn and petitioner personally entered pleas of "guilty" to the counts charging kidnapping and assault. The third count of the information was thereupon dismissed upon the motion of the district attorney, and the matter was referred to the probation officer (CT 4, RT 1-3[3/]).

On June 30, 1958, at the request of the probation officer, additional time was granted for the preparation of the probation report (RT 3-4).

On July 7, 1958, petitioner's motion for probation came on for hearing. The court at this time

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[2/] "CT" refers to the clerk's transcript on appeal in the state courts, a copy of which was lodged with the District Court.

[3/] "RT" refers to the reporter's transcript on appeal in the state courts, a copy of which was lodged with the District Court.

appointed a psychiatrist to examine petitioner and continued the matter another week, commenting that since the offenses carried such a severe penalty, the court should have the benefit of as much medical information as possible. Petitioner's counsel requested that the court release petitioner on bail. This request was denied (RT 4-6).

On July 16, 1958, the court denied petitioner's motion for probation and sentenced him to state prison on each count, the terms to be served concurrently (CT 4-6, RT 6-10).

On July 21, 1958, petitioner noticed an appeal to the District Court of Appeal (CT 8). On June 8, 1959, that court affirmed petitioner's conviction. People v. Rose, 171 Cal.App.2d 171, 339 P.2d 954. On August 5, 1959, petitioner's application for a hearing of his appeal in the Supreme Court of California was denied.

On September 11, 1959, petitioner's application for a writ of error coram nobis was denied by the Superior Court of Alameda County (Rose v. Dickson, Alameda Superior Court No. 29232).[4/]

[4/] Petitioner subsequently filed seven additional actions in the state courts, seeking to collaterally attack his conviction.

Proceedings in the Federal Courts

Early in October of 1962, petitioner filed an application for a writ of habeas corpus in the United States District Court, Northern District of California, Southern Division. On October 15, 1962, the District Court (Honorable Albert C. Wollenberg, Judge) denied the petition for failure to sufficiently allege an exhaustion of state remedies, but on November 14, 1962, after a further showing by petitioner, the order denying petitioner's application was set aside and an order to show cause issued.

After several continuances, the matter was argued on February 11, 1963.[5/] On March 6, 1963, the District Court (the Honorable Stanley A. Weigel, Judge) issued an order denying the petition and discharging the order to show cause. The opinion of the District Court is included in this brief as Appendix "A."

On April 2, 1963, the District Court granted petitioner's application for a certificate of probable cause and leave to appeal in forma pauperis. On April 5, 1963, notice of appeal was filed.

5/ Counsel had been appointed to represent petitioner in the District Court.

Facts

There is no dispute as to the facts in this case, the sole issue being the legal sufficiency of petitioner's allegations coupled with the allegations of his former attorney, Gartner S. Thomas, Esq., to show a prima facie denial of his constitutional rights. In sum, petitioner alleged that he entered a plea of "guilty" to two of the three charges against him because his attorney had advised him that he would be granted probation. Mr. Thomas, petitioner's former attorney, alleged the following in his affidavit: In his original conversations with petitioner, the latter was not inclined to plead guilty because he believed he had a good defense (of some sort, the factual basis or even the nature of any possible defense has never been alleged); that after discussing the case with the investigating officer and the deputy district attorney, he decided that the possibility of probation was so strong that he advised petitioner to plead guilty; that he did not inform petitioner that kidnapping and aggravated assault are punishable by prison terms up to 25 years and 10 years respectively; that petitioner was never told either by himself or by the court that there was a possibility of imprisonment if he did not get probation if he changed

his plea from "not guilty" to "guilty;" and that in his opinion, if petitioner had been told that there was a possibility of a state prison sentence, he would never have changed his plea.

It might be noted that both Mr. Thomas and petitioner's present counsel concede with commendable frankness that there were no assurances from any state officers respecting the granting of probation to petitioner, and that it was the advice of his then attorney, and not the actions of any state officials, which led petitioner to plead guilty.

Petitioner's Contentions

1. Petitioner was denied the effective aid of counsel.

2. The trial court improperly accepted petitioner's plea.

3. This Court should order petitioner's discharge from prison and dismissal of the charges against him.

Summary of Appellee's Argument

1. Petitioner's plea of guilty was freely and voluntarily entered and may not be set aside except upon a showing of improper conduct by state officials.

2. Petitioner was afforded the effective assistance of counsel.

3. Under no circumstances should petitioner be excused from criminal liability on the charges against him, but if a reversal is required, the matter should be remanded to the District Court for an evidentiary hearing on petitioner's allegations.

ARGUMENT

ONE

PETITIONER'S PLEA OF GUILTY WAS FREELY AND VOLUNTARILY ENTERED AND MAY NOT BE SET ASIDE EXCEPT UPON A SHOWING OF IMPROPER CONDUCT BY STATE OFFICIALS.

It bears repeating that petitioner has never alleged that his conviction was brought about by the improper conduct of any state official. In passing upon petitioner's contention that his conviction should be set aside because his expectations of leniency were disappointed, the District Court of Appeal cogently noted:

> "Appellant's contention is based wholly on the claim that he pleaded guilty only on the assurance of his attorney that he 'would positively be given probation.' But assurances of a defendant's own attor-

ney are not sufficient to vitiate a plea of guilty. (In re Atchley, 48 Cal.2d 408, 418 [310 P.2d 15]; People v. Butler, 70 Cal.App.2d 553, 562 [161 P.2d 401].) Such representations can avail a defendant only when there is an apparent corroboration of them by the acts or statements of a responsible state officer. (People v. Gilbert, 25 Cal.2d 422, 443 [154 P.2d 657].) Even if this proceeding be deemed an original application in the nature of coram nobis, and the briefs be considered as affidavits, they fail to show the essential elements of such corroboration." People v. Rose, 171 Cal. App.2d 171, 172; 339 P.2d 954, 955 (1959).

The California rule enunciated by the District Court of Appeal in this case finds its counterpart in that long line of federal cases which squarely hold that a plea of guilty will not be set aside merely because the punishment which is imposed happens to be more severe than the prisoner expected. United States v. Searle, 180 F.2d 209 (7th Cir. 1950); Stidham v. United States, 170 F.2d 294 (8th Cir. 1948); United States v. Sehon Chinn, 74 F. Supp. 189 (S.D.W.Va. 1947), aff'd. per curiam 163 F.2d 876 (4th Cir. 1947); Monroe v. Huff,

145 F.2d 249 (D.C.Cir. 1944); United States v. Colonna, 142 F.2d 210 (3d Cir. 1944); United States ex rel. Wilkins v. Banmiller, 205 F.Supp. 123 (E.D.Pa. 1962).

Petitioner cannot base an argument that he did not intelligently enter a plea of "guilty" on the mere fact that he received a prison sentence instead of probation. The opinion of the United States Court of Appelas for the District of Columbia in Monroe v. Huff, supra, concisely disposes of any such contention. We quote the opinion in full and respectfully urge this Court to follow it.

> "This appeal is from summary denial of a petition for a writ of habeas corpus. Petitioner pleaded guilty to a charge of escaping from custody and is serving a sentence of one to three years. The petition, prepared without the help of counsel, asserts that the attorney who advised the plea was 'incompetent, and disinterested, by advising your petitioner to plead guilty to this charge and not explaining the seriousness of the charge placed against him. He did not, at any time, explain to your petitioner of his constitutional rights, and the said attorney did deprive your petitioner by trick, of a jury trial. Petitioner was

advised to plead guilty of this charge with the understanding that your petitioner would receive a very lenient sentence as he was a personal friend of the Trial Court Justice.' Petitioner's present counsel, appointed by the court, submits that if these statements are true petitioner did not intelligently consent to waive a jury trial and that a hearing should therefore be held to determine the truth of the statement.

"We cannot accept this view. Petitioner knew that he was charged with escaping from custody and that he could choose whether to stand trial or plead guilty. There is nothing to show that he did not profit by his plea, for he might have been given a maximum of five years. But even if he gained nothing by the plea it would not follow that his decision was unwise; and even if it was unwise it would not follow that it was not intelligently made. The substance of his allegations is that he pleaded guilty on the advice of his counsel and received a longer sentence than both hoped. If that were sufficient to show that his plea was not intel-

ligently made few, if any, convictions and sentences on pleas of guilty would be valid. A mere disappointed expectation of great leniency does not vitiate a plea." 145 F. 2d 249.

The record of the proceedings in the Superior Court establish that petitioner personally withdrew his plea of "not guilty" and pleaded "guilty" to the charges against him. When asked whether he wished to withdraw his plea on the first and second counts of the information, petitioner answered in the affirmative and thereupon personally pleaded "guilty" to two of the charges against him,the third one being dismissed on the motion of the district attorney. Thus, it is quite apparent that petitioner knew what he was doing when he withdrew his plea, and he should not be heard to argue now that his conduct was not voluntary or intelligent. The cases relied on by petitioner, i.e., Julian v. United States, 236 F.2d 155 (6th Cir. 1956); United States v. Swaggerty, 218 F.2d 875 (7th Cir. 1955); United States v. Davis, 212 F.2d 264 (7th Cir. 1954); and Fogus v. United States, 34 F.2d 97 (4th Cir. 1929), merely state that the court should see to it that a prisoner who pleads guilty does so freely, voluntarily, intelligently, and personally. The record shows that this was done in the present case. None of the authorities relied on by petitioner can be

construed to hold that a plea of guilty, once entered, may be set aside merely because the prisoner received a sentence more severe than he expected.

TWO

PETITIONER WAS AFFORDED THE EFFECTIVE ASSISTANCE OF COUNSEL.

Petitioner contends that his conviction is a denial of due process because he did not have the effective assistance of counsel. The record shows that counsel represented petitioner throughout the proceedings in the Superior Court. Not only did he secure the dismissal of one of the very serious charges pending against petitioner, namely, count 3 of the information, charging a violation of section 288a of the Penal Code,[6/] but he made a strong argument in favor of probation for petitioner on the remaining two counts (RT 6-8).

The general rule applicable to gauging the competency of counsel is this: That unless it is apparent from the face of the record that counsel has not been afforded adequate opportunity to prepare his case or unless his incompetence is so apparent as to require intervention by either the prosecuting attorney or the

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6/ Violation of Penal Code section 288a is punishable by imprisonment up to 15 years or, where force is involved, life imprisonment.

trial court, there has been no denial of effective counsel in the constitutional sense of the term. Petition of Ernst, 294 F.2d 556 (3d Cir. 1961); Application of Hodge, 262 F.2d 778 (9th Cir. 1958; Darcy v. Handy, 203 F.2d 407 (3d Cir. 1953); United States v. Banmiller, 205 F. Supp. 123 (E.D.Pa. 1962).

Petitioner places strong reliance on the recent decision of this Court in Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962). In that case, this Court held that a petition which alleged the incompetency of counsel by reason of his failure to investigate certain defenses, which were alleged in detail in the petition, stated a cause of action for relief on habeas corpus and justified an evidentiary hearing of that petitioner's allegations. Even in Brubaker, the court noted "the ease with which plausible but unfounded allegations may be made against trial counsel, the temptation of the convicted to blame their attorneys rather than themselves, and the weakness of the threat of perjury against those confined in prison," but held that Brubaker's petition "which was prepared and carefully documented by responsible counsel" necessitated an evidentiary hearing. 310 F.2d at 39.

Here, petitioner's application was prepared by himself, and the only factual matters alleged were those contained in the affidavit of Mr. Thomas which was filed

at the hearing on the order to show cause. That very affidavit shows that petitioner received adequate representation. In contrast to the alleged lack of investigation in Brubaker, this case presents a situation where petitioner's former counsel discussed the matter in detail with the investigating officers and the district attorney and, based upon his exploration of the matter, determined that the most advisable course would be to have his client plead guilty to a portion of the charges, secure a dismissal of the rest, and make a motion for probation. Petitioner has never alleged what "good defense" he had to the charges which counsel prevented him from asserting in the trial court, and it is only reasonable to conclude that petitioner had no defense.

Thus, in the absence of specific factual allegations upon which a claim of incompetency could be founded, the only source of inquiry open to the District Court and to this Court is the record of the state court proceedings, and such record does not reveal any incompetency.

THREE

THIS COURT SHOULD NOT ORDER PETITIONER'S DISCHARGE.

Petitioner argues that this Court has the power to remand this case and order petitioner's complete discharge from prison. See title 28, U.S.C. section 2243.

But in the present case, should this Court conclude that petitioner's allegations were sufficient to warrant issuance of the writ, the release of petitioner from prison would not be justified, but rather an evidentiary hearing in the District Court to assess the truth of his allegations would be required. Petitioner by his plea of guilty admitted that he committed two very serious crimes and by his plea petitioner was able to secure the dismissal of a third charge. To order his release outright would be a manifest injustice.

CONCLUSION

We respectfully submit that petitioner has not alleged any reason sufficient to warrant the issuance of a writ of habeas corpus to set aside his conviction. Represented by competent counsel, petitioner freely and voluntarily admitted the commission of two very serious crimes. That he expected to receive probation for these offenses did not make his admission of them any less voluntary. There being no constitutional infirmity in the judgment of conviction, we respectfully submit that the order of the District Court

denying petitioner's application for habeas corpus should be affirmed.

Dated: August 13, 1963.

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Deputy Attorney General

ROBERT R. GRANUCCI
Deputy Attorney General

Attorneys for Appellee

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

FC
CR SF
62-493

A P P E N D I X "A"

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

GLENN ROSE,

Petitioner,

vs.

FRED R. DICKSON,

Respondent.

No. 41056

ORDER DENYING PETITION FOR HABEAS CORPUS AND DISCHARGING ORDER TO SHOW CAUSE

This matter has been submitted on petition for writ of habeas corpus and the return to the order to show cause. Counsel has been appointed to represent petitioner and has filed herein a traverse to the return and a supplemental memorandum of points and authorities. It is the conclusion of this court that, assuming the allegations of the petition to be true, petitioner is not entitled to the relief sought.

Petitioner pleaded guilty to kidnapping (California Penal Code §207) and aggravated assault (California Penal Code § 245) and was sentenced to serve one to twenty-five years in prison, with the sentences on the two offenses to run concurrently.

The gist of petitioner's first contention is that

his trial attorney did not discuss with him possible defenses to the charges, that the attorney did not tell him that the maximum possible penalty was imprisonment for 35 years, but advised him that he would be granted probation as a result of his guilty plea.

There is a claim that petitioner "was represented by unknown, unappointed, incompetent counsel" (p. 3 of petition for rehearing). At another point, he denies having retained the attorney. (p. 2 of original petition) and at another, that the attorney "self appointed himself counsel of record" (p. 8 of original petition). However, the record shows that this attorney appeared on petitioner's behalf throughout the proceedings in the trial court and on appeal to the District Court of Appeal. [That court described the attorney as "counsel of his (petitioner's) own choice." People v. Rose, 171 C.A.2d 171; 339 P.2d 954 (1959).] Furthermore, the reporter's transcript of the proceedings on five different days in the trial court shows no indication by petitioner that the attorney was not authorized to represent him. Therefore, any contention here that the attorney was not authorized by petitioner to represent him is patently without merit. Barber v. United States, 227 F.2d 431 (10th Cir., 1955). Whether he was retained by petitioner or appointed by the court makes no difference to the outcome of this matter. Compare Application of Hodge, 262 F.2d 778 (9th Cir., 1958)

with Taylor v. United States, 238 F.2d 409 (9th Cir., 1956).

No denial of due process is shown by the fact that a defendant pleaded guilty on the advice of his attorney although the defendant was not aware of the maximum penalty that could be imposed. United States v. Searle, 180 F. 2d 209 (7th Cir., 1950). Similarly, a plea of guilty is not invalid where defendant was not informed of possible defenses by his attorney. United States v. Sturm, 180 F.2d 413 (7th Cir., 1950). (It appears from the affidavit of the trial attorney that petitioner originally pleaded not guilty because he believed he had a good defense.) Nor is the expectation of lenience, which is later proved to be unfounded, sufficient to invalidate a guilty plea and conviction, even though the plea was the result of erroneous information supplied by the defendant's attorney. United States v. Sehon Chinn, 74 F.Supp. 189 (S.D. W.Va., 1947), affirmed per curiam, 163 F.2d 876 (4th Cir., 1947); Monroe v. Huff, 145 F.2d 249 (D.C.Cir., 1944); United States ex rel. Wilkins v. Banmiller, 205 F.Supp. 123 (E.D. Pa., 1962); see also United States v. Parrino, 212 F.2d 919 (2d Cir., 1954), in which the court held that the fact that counsel assured the defendant that a guilty plea would not have the effect of subjecting him to deportation, such advice being erroneous, would not present such injustice as to require vacation of the judgment and withdrawal of the plea.

The facts alleged here, if proved, would not be sufficient to show a denial of the right to effective counsel, assuming that the federal constitution provides such a right in this case. Counsel's representation was not "such as to make the trial a farce and a mockery of justice." Taylor v. United States, supra, p. 414, quoting from United States v. Pisciotta, 199 F.2d 603 (2d Cir., 1952). Allegations of mere mistakes and errors of counsel, or that counsel was incompetent, are not sufficient. Taylor v. United States, supra.

Furthermore, the action of the attorney was not state action within the meaning of the 14th Amendment to the United States Constitution. There is nothing to show that any representative of the state knew of or was responsible for the advice of the attorney upon which petitioner relied. Nor had the trial court any reason to suspect the ability and loyalty of counsel. Application of Hodge, supra.

Cases cited by petitioner do not support his position. In Fogus v. United States, 34 F.2d 97 (4th Cir., 1929), there was a claim that the plea of guilty had been induced by misrepresentations as to possible punishment by the United States Marshal; in Machibroda v. United States, 368 U.S. 487 (1962), it was the United States Attorney; in Smith v. O'Grady, 312 U.S. 329 (1941), it was the district attorney. The ruling in Kercheval v. United States, 274 U.S. 220 (1927) was that a plea of guilty withdrawn by leave of the court

is not admissible in evidence at the trial. The court in United States v. Davis, 212 F.2d 264 (7th Cir., 1954) reversed for a hearing because the record did not conclusively show that the defendant understood the nature of the charges. There is no indication that this was so in this case. Julian v. United States, 236 F.2d 155 (6th Cir., 1956) is to the same effect. In United States v. Swaggerty, 218 F.2d 875 (7th Cir., 1955), the court affirmed the denial of the motion to vacate the judgment, on the grounds that no denial of a fundamental right was shown and that no manifest injustice was shown. One of the factors leading to this decision was that the defendant was aware of the possible penalties when he pleaded guilty. The court did not suggest that it was laying down a constitutional rule or suggest that in the absence of that factor it would have reversed. The cases cited hereinabove show that lack of knowledge of the possible penalties is not sufficient to invalidate a plea of guilty, under the circumstances of this case.

Petitioner's second contention is that he was denied due process of law because the offense of kidnapping, charged in the information, was not charged in the commitment order or related to the offense charged therein. The information charges that the three offenses "were connected together in their commission". (Clerk's Transcript on Appeal, p. 2). Under California law, the offense of kidnapping was therefore properly included. People v. Downer,

37 C.2d 800; 22 Cal. Rptr. 347 (1962). Furthermore, under California law, failure to move the trial court to set aside the information constitutes a waiver of any possible objections that might be made to it. Schlette v. People of the State of California, 284 F.2d 827 (9th Cir., 1960); People v. Rankin, 169 C.A.2d 150; 337 P.2d 182 (1959). There is no federal question presented in such a case unless the irregularities alleged to have been committed under the state practice are so flagrant as to amount to a violation of due process. Application of Lyda, 154 F.Supp. 237 (N.D. Cal. N.D., 1957). The due process requirement is satisfied since it is not suggested that the petitioner was denied sufficient notice of the accusation and an adequate opportunity to defend himself. Garland v. Washington, 232 U.S. 642 (1914); Paterno v. Lyons, 334 U.S. 314 (1948). Nor could such a suggestion successfully be made in view of the following facts disclosed by the record: The information was filed on April 25, 1958; on May 8, 1958, petitioner pleaded not guilty to the three counts charged; on June 9, 1958, he withdrew his plea of not guilty, was rearraigned and pleaded guilty to kidnapping and aggravated assault; at that time the third count of the information was dismissed on motion of the district attorney; no objection to the procedure followed was raised at any time up to and including the appeal.

As to the contention that the conviction is invalid because the corpus delicti of the offenses was not

shown, the guilty plea established all elements of the crime, and nothing needed to be proved. People v. Jones, 52 C.2d 636; 343 P.2d 577 (1959). No federal question is presented by that contention.

All other contentions based on defects in the pleadings and procedure prior to the plea are subject to the same conclusion as the contention regarding the information itself. See cases cited above.

Accordingly, the petition for writ of habeas corpus is denied and the order to show cause is discharged.

Dated: March 6, 1963.

Stanley A. Weigel
Judge

No. 18,671

IN THE

United States Court of Appeals

For the Ninth Circuit

MANILA TRADING & SUPPLY COMPANY (GUAM), INC.,
Appellant,

vs.

A. G. MADDOX,
Appellee.

APPELLANT'S OPENING BRIEF

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 18,671

IN THE

United States Court of Appeals

For the Ninth Circuit

MANILA TRADING & SUPPLY COMPANY (GUAM), INC.,

Appellant,

vs.

A. G. MADDOX,

Appellee.

APPELLANT'S OPENING BRIEF

JURISDICTIONAL STATEMENT

Appellant brought this action against appellee in the District Court of Guam for recovery of gross receipts tax claimed to have been erroneously paid. (R. doc. 1.) Appellee filed an answer incorporating therein certain counter-claims without stating them separately, alleging additional tax due to appellee. (R. doc. 5.) Jurisdiction of this action is vested in the District Court of Guam by § 19508.01 of the Government of Guam, and in the District Court of Guam and the United States Court of Appeals by the Organic Act of Guam, 48 U.S.C., § 1424(a).

STATEMENT OF THE CASE

The appellant is a corporation doing business in Guam and also, in the course of its business, selling goods and merchandise in interstate and foreign commerce for delivery outside Guam. The appellee is the duly appointed and presently acting Commissioner of Revenue and Taxation for the Government of Guam. By stipulation, appellant withdrew its claims in Counts Two, Three and Four of the complaint, leaving only Count One in issue. (R. doc. 12.) Appellee filed its answer, which apparently incorporated therein three counterclaims without stating them separately or designating them as such. (R. doc. 5.) The parties filed pre-trial memoranda (R. doc. 8, 9) and the Court's pre-trial order was filed January 21, 1963, (R. doc. 10.) On March 1, 1963, the parties entered into a stipulation of facts and submitted the action for decision by the Court on those stipulated facts. (R. doc. 12.) In those stipulated facts, it was agreed that the sales in issue involved goods for delivery outside Guam.

On March 14, 1963, the Court filed its findings of fact, conclusions of law and opinion. (R. doc. 13.) The Court held that appellant was not entitled to a refund of the $766.69 prayed for in Count One of its complaint, and held also that the appellee was entitled, on its alleged counterclaims, to an additional gross receipts tax of $182.72. Judgment was, therefore, ordered in favor of appellee on his alleged counterclaims in the amount of $182.72 and against

appellant on its claim for the refund of $766.69. From this judgment the appellant has appealed.

SPECIFICATION OF ERRORS

1. The Court erred in entering judgment for appellee on its alleged counterclaims when the Court lacked jurisdiction over the subject matter of said counterclaims, and when each of said counterclaims failed to state claims upon which relief could be granted.

2. The Court erred in refusing to order appellee to refund taxes claimed in the first count of appellant's complaint on the following grounds:

(a) As applied to this appellant, the gross receipts tax of the territory of Guam is erroneous and illegal in that said taxes are not uniformly applicable in taxing appellant's sales for delivery outside of Guam, and

(b) The assessment and collection of the gross receipts tax was erroneous and illegal in that said taxes were measured against gross proceeds of sales in foreign commerce and were of non-local application.

ARGUMENT

I. THE COURT ERRED IN ENTERING JUDGMENT FOR APPELLEE ON ITS ALLEGED COUNTERCLAIMS WHEN THE COURT LACKED JURISDICTION OVER THE SUBJECT MATTER OF SAID COUNTERCLAIMS, AND WHEN EACH OF SAID COUNTERCLAIMS FAILED TO STATE CLAIMS UPON WHICH RELIEF COULD BE GRANTED.

The appellee inserted three alleged counterclaims in his answer. The counterclaims are set forth as paragraphs 37, 38 and 39 of the answer. They are not designated separately nor are they designated anywhere in the answer as counterclaims. (R. doc. 5.)

Since the counterclaims were not denominated as such, appellant was not required to serve a reply thereto. Fed. Rules Civ. Proc. Rule 7, 28 U.S.C.A.

On January 21, 1963, appellant moved to dismiss the alleged counterclaims and the motion was heard by the Court on February 1, 1963. (R. doc. 7.) The trial court entered judgment against appellant without ever ruling on this motion, except as to the statement in the judgment itself that the Court has jurisdiction. (R. doc. 14.)

Sections 19503, et. seq., of the Government Code of Guam provide for the mandatory procedure to be followed by the Tax Commissioner for the enforcement of any delinquent tax assessment. Prior to taking legal action, the Commissioner must give written notice of the assessment and wait for thirty days subsequent thereto. Gov. Code of Guam, §§ 19503.0101, and 19503.0102.

The stipulations of fact set forth only that the Commissioner determined that the tax was due on an

audit of appellant's books. When appellant filed its complaint, the Commissioner elected to set forth the claim by way of counterclaims in the answer rather than follow the statutory procedure. It follows that the alleged counterclaims fail to state claims upon which relief could be granted and that the trial Court lacked jurisdiction.

II. AS APPLIED TO APPELLANT, BOTH THE GROSS RECEIPTS TAXES ASSESSED, AND ADJUDGED TO BE DUE UNDER THE COUNTERCLAIMS, WERE ERRONEOUS AND ILLEGAL AS NOT UNIFORMLY APPLICABLE.

The Organic Act of Guam provides in part as follows:

> "The legislative power of Guam shall extend to all subjects of legislation of local application not inconsistent with the provisions of this chapter and the laws of the United States applicable to Guam. Taxes and assessments on property, internal revenues, sales, licenses, and royalties for franchises, privileges, and concessions may be imposed for purposes of the Government of Guam *as may be uniformly provided* by the legislature of Guam. . . ." 48 U.S.C. § 1423a.

It is clear from the stipulated facts upon which this case was tried that the gross receipts tax at issue in the complaint and on the counterclaim relates to sales of products for delivery outside of Guam. The District Court of Guam has held that the gross receipts tax is invalid insofar as it purports to impose a tax on goods for delivery outside of Guam. *Ambros, Inc. v. A. G. Maddox,* 203 F.Supp. 934 (1962).

Carrying the logic of the Court in the *Ambros case* one step further, it is irrefutable that wholesalers selling their products to manufacturers, wholesalers or licensed retailers must not be required to pay the gross receipts tax either.

The first paragraph of § 19541.0104 of the Government Code of Guam provides as follows:

> "Provided, that a manufacturer or producer engaging in the business of selling his products to manufacturers, wholesalers, or licensed retailers, shall not be required to pay the tax imposed in this act for the privilege of selling such products at wholesale. . . ."

In the *Ambros case, supra,* the Court said:

> "This section literally means that a local manufacturer or producer who sells directly for export is to be given a competitive tax advantage over sellers for export who are neither manufacturers nor producers."

The Court, in the *Ambrose case;* was talking about selling goods for delivery outside Guam, but there is no logical distinction in the Code section between a manufacturer selling goods for delivery outside of Guam and a manufacturer selling his products to manufacturers, wholesalers, or licensed retailers. If the tax is not uniform as to off-island delivery, it is also not uniform as to all sales at wholesale. It follows that sales made by appellant to its parent company were properly not subject to the gross receipts tax whether such sales were at wholesale or for delivery outside of Guam. Any other interpretation, according

to the decision of the Court in the *Ambros case,* invalidates the tax as being not uniformly applicable.

When construing the decision of the *Ambros case,* together with the Court's opinion in the instant case, it is quite apparent that the Court attempts to arrive at a distinction between sales for delivery to the purchaser outside of Guam, and sales made at wholesale in Guam. It is submitted that there is no such valid decision and that the opinion of the Court was correct in the *Ambros case.* For compelling reasons of logic, the opinion in the instant case is erroneous. First of all, it is very clear from the stipulated facts that delivery was to be made outside Guam. The Court, in its opinion in the instant case, apparently decides that the tax is applicable because the transaction was not made in the "normal course of foreign commerce." It appears from the statute that this distinction is not the issue. The words used in the Code section do not refer to foreign commerce but merely state, "for delivery to the purchaser outside of Guam."

There is no conflict in the opinion in the instant case and the *Ambros case* except insofar as the Court misconstrues the facts and their construction under the statute in question. The *Ambros case* could not be clearer in holding that the tax is invalid as not uniformly applicable if it gives a competitive advantage to manufacturers and producers for sales for delivery outside Guam. The conclusion is also inescapable that if the tax is not uniformly applicable for such sales, it is also not uniformly applicable for

sales at wholesale to manufacturers, wholesalers, or licensed retailers. Gov. Code Guam, § 19541.0104.

III. PURSUANT TO THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION, THE BUSINESS PRIVILEGE GROSS RECEIPTS TAX LAW OF GUAM IS AN EXPRESS BURDEN ON FOREIGN AND INTERSTATE COMMERCE, AND IS, THEREFORE, INVALID.

In the instant case, the Court in its opinion makes a finding that the transactions in issue were not undertaken in the normal course of foreign commerce. It is submitted that this fact is erroneous and is not supported by the findings of fact stipulated to. Further, § 19541.0101 of the Government Code of Guam clearly purports to impose a tax burden on foreign or interstate commerce. There seems to be little question that the commerce clause precludes the levying of a tax under state or territorial authority upon the gross receipts of interstate or foreign commerce, or upon the privilege of conducting such business measured by those gross receipts. *Joseph v. Carter & Weekes Stevedoring Co.,* 330 U.S. 422, 91 L. Ed. 993.

This Court in *Anderson v. Mullaney,* 199 F. 2d 123, (1951) has held that a territorial legislature has no greater freedom in burdening commerce than any of the several states in the Union. In the case of *Ambros, Inc. v. Maddox, supra,* the District Court of Guam stated that it was not "entirely persuaded that *Anderson v. Mullaney* was conclusive in view of *Arctic Maid v. Territory of Alaska,* 277 F. 2d 120, reversed 366 U.S. 199, 81 S.Ct. 929, 6 L. Ed. 2d 227. It is sub-

mitted that the reversal of the *Arctic Maid case* by the United State Supreme Court was not a ruling on the power of a territory to burden commerce, foreign or interstate. The Supreme Court in the reversal of the *Arctic Maid case* merely stated that the tax was not discriminatory and fell within the taxing powers of Alaska. In any event the *Arctic Maid case* could never be considered authority which in any way contradicts the holding of the *Anderson case* as to the power of a territory to impose burdens on interstate and foreign commerce.

The Court in the *Ambros case* held that the word "not" which had formerly been included in § 19541.0101 of the Government Code may have been inadvertently omitted. Mr. Justice Jackson is then quoted as saying that "Judicially we must tolerate what personally we may regard as a legislative mistake." It appears from the language of Mr. Justice Jackson that he was not talking about a typographical error or mistake in printing, but a mistake in policy. It, therefore, does not follow that the Court should assume that because a word was omitted which completely changes the meaning of the statute, that the Court should not interpret the statute. This is particularly true in view of the fact that the statute, as it now reads, clearly purports to give the Guam Legislature power to burden foreign and interstate commerce in any way it pleases under the Business Privilege and Gross Receipts Tax Law.

On the other hand, if the word "not" is considered to have been omitted inadvertently and should, therefore, be read into § 19541.0101, then the tax is

not being administered properly because it is extremely clear from the facts in this case that the gross proceeds of sales on tangible property in foreign commerce do constitute a part of the measure of the tax imposed.

IV. THE GROSS RECEIPTS TAX AS APPLIED TO APELLANT IS OF NON-LOCAL APPLICATION AND, THEREFORE, INVALID.

The Organic Act of Guam provides that,

> "The legislative power of Guam shall extend to all subjects of legislation of local application not inconsistent with the provisions of this chapter and the laws of the United States applicable to Guam. . . ." 48 U.S.C. § 1423a.

Insofar as appellant has been taxed for sales for off-island delivery, the tax is obviously of non-local application. The words "local application" have been construed by the Supreme Court of the United States. In *Granville-Smith v. Granville-Smith,* 75 S. Ct. 553, 349 U.S. 1, 99 L. Ed. 773 (1955), the Court held that "local application" obviously implies limitation to subjects having relevant ties within the territory. The Court also said,

> "In the circumstances, we cannot conclude that if Congress had consciously been asked to give the Virgin Islands legislative assembly power to do what no state has ever attempted, it would have done so."

The Guam Gross Receipts Tax Law clearly and expressly purports to burden foreign commerce. Gov. Code of Guam, § 19541.0101.

V. CONCLUSION

It is, therefore, respectfully submitted that the District Court of Guam erred in granting judgment on appellee's purported counterclaims and in refusing to enter judgment to appellant on the allegations of the first count of its complaint. It is, therefore, respectfully submitted that the judgment of the District Court of Guam should be reversed.

Dated, September 30, 1963.

BARRETT, FERENZ & TRAPP,
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Attorneys for Appellant.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

W. SCOTT BARRETT

No. 18,671

IN THE

United States Court of Appeals

For the Ninth Circuit

MANILA TRADING & SUPPLY COMPANY (GUAM), INC.,
Appellant,

vs.

A. G. MADDOX,
Appellee.

BRIEF FOR APPELLEE

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No. 18,671

IN THE

United States Court of Appeals

For the Ninth Circuit

MANILA TRADING & SUPPLY COMPANY (GUAM), INC.,	*Appellant,*
vs.	
A. G. MADDOX,	*Appellee.*

BRIEF FOR APPELLEE

JURISDICTIONAL STATEMENT

This action was commenced by appellant in the District Court of Guam seeking a refund of gross receipts taxes. (R., doc. 1) Appellee counterclaimed for additional gross receipts taxes pursuant to Rule 13(a), Federal Rules of Civil Procedure. (R., doc. 5, p. 4.)

Jurisdiction of this action is vested in the District Court of Guam by Section 19508.01, et seq., Government Code of Guam, and by the Organic Act of Guam, 64 Stat. 307 (1950), 48 U.S.C., Section 1424(a) (1958).

Appeal to this court is authorized by 28 U.S.C., Section 1291 (1958), and 28 U.S.C., Section 1294(4) (1958 Supp. IV).

STATEMENT OF THE CASE

In 1959 and 1961, Manila Trading and Supply Company (Guam), Inc., appellant herein, negotiated and sold, in Guam, automobile and truck parts to Manila Trading and Supply Company (Philippines), Inc., its parent corporation. (R., doc. 12, p. 2.) The above sales amounted to $38,334.79, and a gross receipts tax of $766.69 thereon was voluntarily paid by appellant to the Commissioner of Revenue and Taxation, Government of Guam, appellee herein. (R., doc. 13, p. 1.)

This action was commenced in the lower court by appellant seeking to recover the above tax in count one of its complaint. (R., doc. 1, pp. 1-2.) The complaint alleged that the above tax is illegal in that the taxes were not uniformly applicable in violation of the legislative powers conferred by the Organic Act of Guam, that the taxes were measured by the application of rates against gross proceeds of sales in foreign commerce, and that the taxes were subjects of nonlocal application. (R., doc. 1, p. 2.)

In 1959, 1960 and 1961, appellant, as agent of United States sellers, received commissions from sales of cars to Guam buyers for delivery in the United States mainland. (R., doc. 13.) These commissions were not reported by appellant in its gross receipts tax returns for the above years, and appellee counter-

claimed for the taxes due thereon. (R., doc. 5, p. 4.) By stipulation, the parties agreed as to the amount of commissions not so reported and as to the amount of tax due the government if the tax is upheld. R., doc. 12, p. 3.)

The parties to this suit stipulated, among other things, that appellant is a domestic corporation; that it annually filed application to do business as a wholesale, retail and service organization; that the sales between it and its parent corporation were negotiated for and completed in Guam; and that title to the merchandise passed on Guam, but delivery was to be made to the Philippines with the purchaser bearing all expenses for freight, handling, shipping and delivery charges. (R., doc. 12.)

The case was submitted for decision to the lower court on the basis of the stipulation entered on March 1, 1963. (R., doc. 13, p. 1.)

On January 21, 1963, appellant gave notice that it will move the court to dismiss the counterclaim on the grounds that the court lacked jurisdiction and the counterclaims do not state claims upon which relief can be granted. (R., doc. 7.) The record does not indicate how this motion was treated, if at all, but appellant states in its brief that the motion was heard on February 1, 1963. (Appellant's Brief, p. 4.)

The court rendered a judgment in favor of appellee on his counterclaim of $182.72 and against appellant on its claim for refund of $766.69.

From this judgment, the appellant appeals.

SUMMARY OF ARGUMENT

I

The lower court had jurisdiction to enter judgment on the counterclaims and the counterclaim did state claims upon which relief could be granted.

A. Jurisdiction of the complaint confers jurisdiction over compulsory counterclaims. No one questions that the lower court had jurisdiction of the complaint.

The counterclaims dealt with the same tax and involved the same tax years as the complaint. Such logical relationship establishes that the counterclaims were compulsory under Rule 13(a), Federal Rules of Civil Procedure.

The court's jurisdiction of the complaint, therefore, supports its jurisdiction over the counterclaims.

B. The counterclaims did state claims upon which relief could be granted.

Section 19503, et seq., Government Code of Guam, was, by implication, interpreted by the lower court as not embracing counterclaims by the Tax Commissioner in suits for refund of taxes. Such interpretation is binding on this court unless manifest error is shown. Appellant failed to show manifest error.

Since appellant's contention that the counterclaims did not state claims upon which relief could be granted is supported solely by Section 19503, et seq., its non-applicability disposes of its objection.

II

The Commerce Clause does not bar the tax measured by commission received by appellant from state-side sellers.

The Commerce Clause does not preclude a tax on local activities measured by commissions received on interstate sales. The services performed by appellant in earning the commissions being performed wholly in Guam constitute intrastate activities beyond the protection of the Commerce Clause.

Even if appellant's performance of service is considered interstate commerce, including the receipts thereof in measuring a tax for the privilege of doing a local business is not precluded by the Commerce Clause because the tax is nondiscriminatory and cannot be repeated by any other state.

III

Neither the Commerce Clause nor the Import-Export Clause bar a tax measured by receipts of a local sale though the goods sold were intended for shipment to the Philippine Islands.

Any tax is prohibited by the Import-Export Clause on goods having the status of "export". The automobile and truck parts sold to appellant's parent corporation were not shown to have been "exports" at the time of sale. Therefore, the receipts from such sale may be included in the measure of a tax on the privilege of doing a local business.

IV

The Gross Receipts Tax is uniformly applicable and is a subject of local application as required by the Organic Act of Guam.

The tax is uniformly applicable because it treats members within a class in the same manner. The classification distinguishing wholesalers from manufacturers or producers is a reasonable one, and appellant has not shown otherwise nor any harmful effect on it.

The tax is a subject of local application because it deals with persons and activities essentially local in nature.

ARGUMENT

I

THE COURT BELOW DID NOT ERR IN ENTERING JUDGMENT FOR APPELLEE ON HIS COUNTERCLAIMS BECAUSE THE COURT HAD JURISDICTION AND THE COUNTERCLAIMS DID STATE CLAIMS UPON WHICH RELIEF COULD BE GRANTED.

A. Jurisdiction over the subject matter of the complaint is sufficient to support jurisdiction over a compulsory counterclaim.

Appellant's jurisdictional statement in its brief shows that the lower court had jurisdiction of the complaint. Appellant's Brief, p. 1.)

That the counterclaims are compulsory under Rule 13(a), Federal Rules of Civil Procedure, made applicable to Guam by the Organic Act of Guam, 64 Stat. 389 (1950), 48 U.S.C., Section 1424(b) (1948),

is supported by a comparison of the claims alleged in the complaint (R., doc. 1) and those alleged in the counterclaims. (R., doc. 5, p. 4.)

Appellant alleged that gross receipts taxes were illegally assessed and collected on various dates in 1959, 1960 and 1961, and prayed for a refund of all such taxes. (R., doc. 1, pp. 1-11.)

Appellee alleged that appellant underreported its receipts for gross receipts tax purposes in 1959, 1960 and 1961, and prayed for the tax due thereon. (R., doc. 5, p. 4.)

The claims by both parties involved the same taxes as well as the same years. A more logical connection could not be imagined, and it should be held that the counterclaims were compulsory under Rule 13(a). *Rosenthal v. Fowler,* 12 F.R.D. 388 (S.D. N.Y. 1952.)

Section 19503, et seq., Government Code of Guam, does not apply as it does not concern the lower court's jurisdiction.

B. The counterclaims do state claims upon which relief could be granted.

Appellant contends that the counterclaims do not state claims upon which relief could be granted. In support of this contention, appellant asserts that the Tax Commissioner failed to comply with the notice and waiting period requirement of Section 19503, et seq., Government Code of Guam. (Appellant's Brief, pp. 1-2.)

Appellant assumes without argument that Section 19503, et seq., Government Code of Guam, is appli-

cable to an action in which the Tax Commissioner is being sued for a refund such as in the case herein.

The statute, however, is not explicit on the subject. That being the case and the statute being local, it is subject to interpretation by the lower court, and if the interpretation is not manifestly in error, it will be affirmed in this court. *Gumataotao v. Government of Guam,* Appeal No. 18,448 (9th Cir., Sept. 16, 1963.)

Appellant stated that it moved to dismiss the counterclaims and the motion was heard by the court. (Appellant's Brief, p. 1.) Record Document 7, pointed out by appellant, is, among other things, a notice that appellant will move the court to dismiss the counterclaims for lack of jurisdiction and for failing to state claims upon which relief may be granted.

The record does not indicate that the motion was heard. Assuming, however, that it was heard, appellant must have argued to the lower court the applicability of Section 19503, et seq., Government Code of Guam, to the counterclaims. If this is true, then implicit in the judgment of the court on the counterclaim is the ruling that Section 19503, et seq., is not applicable to counterclaims.

Is such a ruling manifestly in error?

The lower court could reasonably have ruled that a counterclaim which is compulsory under Section 13(a), Federal Rules of Civil Procedure, filed in a refund suit is not a legal action contemplated by Section 19503, et seq., Government Code of Guam.

The difference between an original action against a taxpayer and a counterclaim against him is sub-

stantial enough to support the distinction above made. An original action involuntarily brings a taxpayer to court. In a counterclaim, the taxpayer is voluntarily in court. In the former case, a taxpayer has no opportunity to decide whether he will contest or pay the tax. In the latter, no such opportunity is needed because the taxpayer has already decided to contest the tax at least on the aspects involved in his claim.

An original action by the government may be deferred until notice is given without any significant detriment to it. A compulsory counterclaim cannot be so deferred, as it may bar the government's claim.

The court could also have reasonably ruled that a counterclaim for a deficiency in a refund suit is not an action seeking the collection of a deficiency but rather is an action to establish the existence of such a deficiency. Thus, a final judgment in such action may be but a basis for an assessment against the taxpayer which would be subject to the notice provision prior to its execution.

The above reasons support the conclusion that appellant has not shown manifest error in the lower court's implied holding that Section 19503, et seq., does not apply to a counterclaim, and the judgment should be affirmed.

II

A NONDISCRIMINATORY TAX MEASURED BY COMMISSIONS RECEIVED FOR SERVICES RENDERED IN GUAM DOES NOT VIOLATE THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION, ARTICLE I, SECTION 8, CLAUSE 3, BECAUSE IT IS A TAX FOR THE PRIVILEGE OF ENGAGING IN A LOCAL BUSINESS AND FOR THE PRIVILEGE OF EXERCISING CORPORATE POWERS.

A. The tax imposed by Sections 19540 and 19541.03, Government Code of Guam, is a tax on the privilege of exercising corporate powers in Guam and on the privilege of engaging in a local service business, and its measure includes commissions.

The statement of the case indicates that there are two types of transactions involved in this case. One type consists of sales of automobile and truck parts by appellant. The other consists of commissions received by appellant from mainland sellers for services rendered by appellant in procuring Guam buyers. The latter transaction is the subject of this argument.

The purpose of this subsection is to identify the provisions of the Business Tax Law, Title XX, Chapter 6, Government Code of Guam, under which the contested tax was levied and to indicate the subject matter and the measure of the tax.

The applicable provisions are as follows:

> "Section 19540. Levy. There is hereby levied and shall be assessed and collected monthly privilege taxes against the persons on account of their businesses and other activities in Guam measured by the application of rates against values, gross proceeds of sales or gross income, as the case may be."

"Section 19541.03. Tax on Service Business. Upon every person engaging or continuing within Guam, in any service business or calling not otherwise specifically taxed under this Section, a tax equivalent to two per cent (2%) of the gross income of such business."

"Section 19500.01. 'Business' and 'Engaging in Business' includes all activities whether personal, professional or corporate, carried on within Guam for economic benefit either direct or indirect but shall not include casual sales; engaging in business shall also include the exercise of corporate franchise powers."

"Section 19500.05. 'Gross Income' . . . shall mean the total receipts, cash or accrued, of the taxpayer received as . . . commissions . . ."

These provisions clearly indicate that the subject of the tax is both the privilege of exercising corporate powers in Guam and the privilege of engaging in a service business in Guam. The measure of the tax is two per cent (2%) of the gross income which includes commissions.

Appellant being a domestic corporation and being licensed to engage in a service business is subject to the tax unless the tax is proven unconstitutional. This much appellant apparently concedes inasmuch as no issue was raised concerning the scope of the statute.

B. A tax on the privilege of exercising corporate powers in Guam and on the privilege of engaging in Guam in a service business is a tax on intrastate commerce and, therefore, not barred by the Commerce Clause, though the measure of the tax may include commissions on interstate sales.

Appellant is a Guam corporation. It negotiated on behalf of mainland United States sellers sales of automobiles to buyers who were in Guam. The services rendered by appellant were rendered in Guam.

It necessarily follows that such activities being local in nature, Guam can exact a tax for the privilege of engaging in them. *Memphis Natural Gas Co. v. Stone,* 335 U.S. 80, 68 S. Ct. 1475 (1948.)

The sale of automobiles by a United States seller to a Guam buyer is concededly interstate commerce. The services rendered by appellant were concededly in aid of such interstate commerce, but this does not change the local nature of such services. *Western Live Stock v. Bureau of Revenue,* 303 U.S. 250, 58 S. Ct. 546 (1938.)

That the measure of the tax includes commissions resulting from interstate sales is not controlling. *Ficklen v. Taxing District of Shelby County,* 145 U.S. 1, 12 S. Ct. 810 (1892), and *In re Taxes,* 379 P. 2d 336 (S. Ct. Ha., 1963.)

In the *Ficklen* case, *supra,* Tennessee imposed a license on the privilege of engaging in the general business of a broker measured by the gross receipts of the business. A license holder opposed the exaction on the ground that his business consisted almost entirely of commissions, derived from sales by firms

outside Tennessee to buyers in Tennessee, and, therefore, the Commerce Clause barred the exaction. The Supreme Court upheld the tax on the rationale that the privilege being taxed is of a local nature and not affected by its measure.

The facts of this case fall closely to those in the *Ficklen* case. Appellant is licensed to engage in a general service business. The tax is on the privilege of engaging in such business. Here, as in the *Ficklen* case, the measure of the tax includes commissions derived from interstate sales. The *Ficklen* case should, therefore, control and dispose of this case.

In re Taxes, supra, is again analogous to this case. In that case, the Supreme Court of Hawaii upheld a tax measured by commissions received from United States manufacturers by a manufacturer's representative for services rendered in Hawaii in procuring buyers. The rationale of the Hawaii case is that the services were rendered in Hawaii, and thus local in nature.

The rationale of these two cases should be followed in this case and the tax upheld.

In re Taxes, supra, also stressed the fact that the tax is nondiscriminatory. Section 19541.03, Government Code of Guam, imposes the tax without any distinction and is thus nondiscriminatory.

C. Should it be ruled that appellant in performing the services herein involved was engaged in interstate commerce, the tax is nevertheless valid because Guam has a "jurisdiction to tax" in a due process sense, the tax is nondiscriminatory, and it cannot be repeated by any other state.

Appellant asserts that the Business Privilege Tax Law of Guam is an express burden on interstate commerce, and is, therefore, invalid. (Appellant's Brief, p. 8.) In support of this argument, appellant states that Section 19541.0101, Government Code of Guam, purports to impose a tax burden on interstate commerce.

As noted at the beginning of this argument, the transaction involved herein is the commissions received by appellant for services rendered. Thus, Section 19541.0101 has no application because that concerns the measure of the tax imposed for the privilege of selling tangible property. The tax herein questioned is measured by Section 19541.03 as pointed above.

Appellant's basic premise seems to be that a tax which expressly burdens interstate commerce is per se barred by the Commerce Clause. *Joseph v. Carter & Weekes Stevedoring Co.,* 330 U.S. 422, 67 S. Ct. 815 (1947), is cited as supporting this proposition.

Appellant is peculiarly silent on the facts of the *Joseph* case. The facts of that case show that it involved a tax imposed on a stevedoring business. The court invalidated the tax because stevedoring was held to be an integral part of interstate commerce, and an exaction from such business is an exaction for the privilege of doing interstate commerce.

Thus, it is clear that the *Joseph* case was influenced by the fact that it concerned a stevedoring business. The Supreme Court recognized this and refused to extend its principle to other activities even more closely related to that case than to this one. *Alaska v. Arctic Maid,* 366 U.S. 199, 81 S. Ct. 929 (1961.)

A tax which affects interstate commerce "directly" is not per se barred by the Commerce Clause. *Interstate Oil Pipe Line Co. v. Stone,* 337 U.S. 662, 69 S. Ct. 1264 (1949); *International Harvester Co. v. Department of Treasury,* 322 U.S. 340, 64 S. Ct. 1019 (1944), recently cited with approval in a per curiam opinion, *State Tax Commission of Utah v. Pacific States Cast Iron Pipe Co.,* 372 U.S. 605, 83 S. Ct. 925 (1963); and *McGoldrick v. Berwind-White Coal Mining Co.,* 309 U.S. 33, 60 S. Ct. 388 (1940.)

Interstate Oil Pipe Line Co. case, *supra,* involved a gross receipts tax on the privilege of operating a pipe line wholly within the state of Mississippi. The measure of the tax included the total receipts received from such business unapportioned. The pipe line involved was owned by a Delaware corporation qualified to do business in Mississippi. The pipe line transported oil from the producers well to racks adjacent to railroads, and from which the oil was poured into tank cars for delivery to points outside Mississippi. The pipe line company charged the producers a fee for the delivery of the oil to the racks.

In upholding the tax, the court assumed without deciding that the pipe line company was engaged in

interstate commerce. The rationale of the case is that sufficient contact with Mississippi is present to give that state jurisdiction to tax; the tax is nondiscriminatory; since the activity is purely local, no apportionment is necessary; and the tax cannot be repeated by any other state.

The present tax meets these standards. Appellant is a domestic corporation engaged in a general service business. Sufficient contacts are present to permit Guam to tax in the due process sense. Section 19541.03 taxes every person engaged in a service business. No distinction is drawn, therefore, the tax is nondiscriminatory. The tax need not be apportioned because the services by appellant were rendered in Guam. This distinguishes cases such as *Gwin, White & Prince, Inc. v. Henneford,* 305 U.S. 434, 59 S. Ct. 325 (1939), where services were rendered outside the state. Finally, the incident of the tax being local, no other state can repeat the tax.

For the reasons above mentioned, the tax herein questioned should be upheld.

III.

A NONDISCRIMINATORY TAX MEASURED BY SALES NEGOTIATED AND COMPLETED IN GUAM DOES NOT VIOLATE THE COMMERCE CLAUSE, ARTICLE I, SECTION 8, CLAUSE 3, OR THE IMPORT-EXPORT CLAUSE, ARTICLE I, SECTION 10, CLAUSE 2, OF THE FEDERAL CONSTITUTION BECAUSE IT IS A TAX FOR THE PRIVILEGE OF ENGAGING IN A LOCAL BUSINESS AND FOR THE PRIVILEGE OF EXERCISING CORPORATE POWERS IN GUAM, AND IS NOT A TAX ON EXPORTS.

A. The tax imposed by Sections 19540 and 19541.01, et seq., Government Code of Guam, is a tax on the privilege of selling tangible goods in Guam and for the privilege of exercising corporate powers measured by two per cent (2%) of gross sales.

Section 19540 levies a tax on every person on account of his business and other activities in Guam. Section 19500.01 includes in the definition of business the exercise of corporate powers.

A tax of two per cent (2%) of gross proceeds of sales is laid upon every person engaging within Guam in the business of selling any tangible property. Section 19541.01, Government Code of Guam.

Section 19541.0101 provides that gross proceeds of sales of tangible property in foreign commerce shall constitute a part of the measure of the tax imposed.

Section 19501.03 provides that if any person is engaged in business both within and without Guam, and if, under the Constitution or laws of the United States, the entire gross income or scope of such business activity of such person cannot be included in the measure of any tax under this Chapter, there shall then be apportioned to Guam and included in the tax

base that portion of the gross income or business activity which is derived from or attributable to Guam.

It is clear from a mere reading of the above provisions that the Legislature intended to exert to the fullest extent its power to tax. It is also clear that it did not intend to tax any transaction which the Constitution or the laws of the United States prohibits it from taxing. Such being the case, it cannot be contended that the Business Privilege Tax Law is unconstitutional on its face.

The above provisions also show that the subject of the tax is the privilege of selling tangible property in Guam as well as the privilege of exercising corporate powers.

Appellant, it has been shown, exercised its corporate powers in Guam. In addition to being licensed to engage in a service business, it also is licensed to engage in wholesaling as well as retailing.

That it sold tangible property in Guam is clear from the stipulation of facts. (R., doc. 12.) It is therein stipulated that sales of automobile and truck parts were negotiated in Guam and title passed in Guam.

Such sales are, therefore, within the measure of the tax unless barred therefrom by any provision of the Constitution or laws of the United States.

B. Neither the Commerce Clause nor the Import-Export Clause bars the transactions herein from being made a part of the measure of the tax imposed by Sections 19540 and 19541.01, Government Code of Guam.

The transaction, included as a measure of the tax, involved sales by appellant in Guam of automobile and truck parts to its parent corporation in Manila, Republic of the Philippines for delivery to the Philippines.

Concededly, the sale invloves foreign commerce as that term is used in the Commerce Clause since the destination of the goods is the Philippines. Whatever was said as to the validity of the tax on commissions in the preceding argument equally applies to the objection raised herein under the Commerce Clause.

A more appropriate objection is whether the tax is barred by the Import-Export Clause. That provision prohibits a state from laying any impost or duties on imports or exports without the consent of Congress except what is absolutely necessary for executing its inspection laws. United States Constitution, Article I, Section 10, Clause 2. While appellant makes no reference to this Clause, it should be considered since, as pointed out, the statute was not intended to reach any transaction barred by the United States Constitution. The cases passing on the validity of tax measures under the Import-Export Clause are, therefore, relevant.

Appellee concedes that the tax herein levied is equivalent to an impost or duty and if laid on exports is invalid. *Brown v. Maryland,* 25 U.S. (12 Wheat.)

419 (1827). The only issue remaining is whether the goods sold, i.e., automobile and truck parts, were, at the time of sale, "exports" within the meaning of the Import-Export Clause.

The Import-Export Clause prohibits the laying of any tax on exports. *Richfield Oil Corp. v. State Board of Equalization,* 329 U.S. 69, 67 S. Ct. 156 (1946). The tax exacted is, therefore, not material as long as it is imposed on exports.

When are goods within a state deemed to be "exports"? This question was answered in *Empresa Siderurgica v. County of Merced,* 337 U.S. 154, 69 S. Ct. 995 (1949), in the following language:

> "'* * * goods do not cease to be part of the general mass of property in the state, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation, to another state, or have been started upon such transportation in a continuous route or journey.' . . . That test was fashioned to determine the validity under the Commerce Clause of a nondiscriminatory state tax . . .
>
> "Under that test it is not enough that there is an intent to export, or a plan which contemplates exportation, or an integrated series of events which will end with it . . . The tax immunity runs to the process of exportation and the transactions and documents embraced in it . . . It is the entrance of the articles into the export stream that marks the start of the process of exportation. Then there is certainty that the goods are headed for their foreign destination and will

not be diverted to domestic use. Nothing less will suffice." (Citations omitted) 337 U.S. at 156, 69 S. Ct. at 996-997.

The *Empresa* case, *supra,* involved a cement plant located in Merced County, California, which was sold to a Columbia corporation for export to South America. The plant was partially dismantled and parts of it were on their way to South America. The court nevertheless upheld a tax on the portion that was in Merced County on the tax date. The portion thus remaining consisted of parts dismantled, packed and crated; parts dismantled but not yet packed and crated; and parts not yet dismantled.

In thus upholding the tax, the court considered as irrelevant that there was a purpose and plan to export the plant and that the export actually occurred.

Applying the test thus laid down to the facts in this case, it is evident that the automobile and truck parts were not exports at the time of sale.

Appellant has not shown that the tax incident was simultaneous with the delivery of the goods to an exporting carrier for shipment abroad as was true in *A. G. Spalding & Bros. v. Edwards,* 262 U.S. 66, 43 S. Ct. 485 (1923), and *Richfield Oil Corp. v. State Board of Equalization, supra.*

In both the *Spalding* and the *Richfield* cases, the court was satisfied with the certainty that the goods will be shipped to foreign ports. In the *Empresa* case, however, the court was not satisfied although the facts were clear that the cement plant was intended to be

reassembled in South America and some parts had already proceeded thereto. Furthermore, the fact that the plan to export was fully executed was not sufficient.

If certainty of export is the test, then the facts in the present case fall far short of the certainty required by the *Empresa* case.

Appellant has failed to present facts sufficient to establish the goods herein involved to be "exports." Since the burden of proof is on appellant to show that the transaction is within the immunity of the Import-Export Clause, *People of the State of New York v. Graves,* 300 U.S. 308, 57 S. Ct. 466 (1937), its failure to carry that burden should result in the affirmance of the judgment below.

IV

THE GROSS RECEIPTS TAX IMPOSED BY SECTIONS 19540, 19541.01 AND 19541.03, GOVERNMENT CODE OF GUAM, DOES MEET THE REQUIREMENTS OF THE ORGANIC ACT OF GUAM, 64 STAT. 387 (1950), 48 U.S.C., SECTION 1423a (1948), WHICH REQUIRE THAT TAX MEASURES BE UNIFORMLY APPLICABLE AND THAT THE LEGISLATIVE POWER BE CONFINED TO MATTERS OF LOCAL APPLICATION.

A. The tax is uniformly applicable as required by the Organic Act.

Appellant asserts that the tax is not uniformly applicable because manufacturers and producers are exempted from the tax on their sales to wholesalers. (Appellant's Brief, pp. 5-6.) The only authority relied upon by appellant is *Ambros, Inc. v. A. G. Maddox,* 203 F. Supp. 934 (1962).

The uniformity requirement of the Organic Act should be likened to the uniformity required of state tax laws under the 14th Amendment. *Hess v. Mullaney,* 213 F.2d 635 (1964), cert. den., sub nom., *Hess v. Dewey,* 348 U.S. 836, 75 S. Ct. 50 (1954). If this is so, then the issue to be decided is whether the classification adopted by the Legislature is so hostile and discriminatory that it must be invalidated. *Madden v. Commonwealth of Kentucky,* 309 U.S. 83, 60 S. Ct. 406 (1940). The burden of showing that such is the case rests upon the one seeking to overturn the "legislative arrangement," and such burden is not met unless "every conceivable basis which might support it" is negatived. *Madden v. Commonwealth of Kentucky, supra,* 309 U.S. at 88.

Concededly, the Legislature exempted wholesale sales of manufacturers and producers from the tax levied by Sections 19540 and 19541.01, Government Code of Guam; but that manufacturers and producers are essentially different from wholesalers is evident. This difference is both in their mode of operations and in their manner of selling. The Legislature may have felt that producers and manufacturers should be taxed differently because the benefits it receives from the government differ from other business enterprises. This difference between the classes is sufficient to support the partial exemption given to manufacturers and producers. As the court said in the *Madden* case, *supra,* "In taxation, even more than in any other fields, legislatures possess the greatest freedom in classification." 209 U.S. 83, 88.

In *Brodhead v. Borthwick,* 174 F. 2d 21 (1949), cert. den., 338 U.S. 847, 70 S. Ct. 87 (1949), this court sustained an excise tax imposed by Hawaii against the objection that the classification of "retailers" and "wholesalers" was invalid. The Guam tax law is similar, if not identical, to the Hawaii law. If retailers and wholesalers can be classified separately for tax purposes, the same should hold true as between wholesalers and manufacturers or producers.

Finally, this court should take judicial notice that Guam is not a manufacturing or producing state. Hence, any discrimination which may be imposed on appellant who deals in automotive business is merely theoretical and should not be used to invalidate the statute. *Texaco Puerto Rico, Inc. v. Descartes,* 304 F. 2d 184 (1962), cert. den., 83 S. Ct. 720 (1963); *Hess v. Mullaney,* 213 F. 2d 635 (1954), cert. den., sub. nom.; *Hess v. Dewey,* 348 U.S. 836, 75 S. Ct. 50 (1954).

B. The tax is a subject of local application as required by the Organic Act.

Appellant argues that the tax is of nonlocal application and, therefore, invalid. (Appellant's Brief, p. 10.) *Granville-Smith v. Granville-Smith,* 349 U.S. 1, 75 S. Ct. 553 (1955), is cited as authority.

The *Granville-Smith* case involved a divorce statute which the court held was designed to attract persons from outside the Virgin Islands. It is, therefore, not apposite to the statute involved in this case.

It has been shown, however, that the tax herein questioned is a general tax measure imposed on per-

sons on account of their businesses and activities in Guam. As such, it embraces a subject of local application and is valid.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the lower court be sustained.

Dated, Agana, Guam,
November 22, 1963.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

HAROLD W. BURNETT,
Attorney General,
Attorney for Appellee.

No. 18672

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CONTINENTAL SHIPPERS' ASSOCIATION, INC.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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No. 18672

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Appellee.

APPELLEE'S BRIEF.

I.

JURISDICTION AND STATEMENT OF THE CASE.

The United States Attorney for the Southern District of California filed Information No. 30731-CD on April 16, 1962, charging appellant Continental Shippers' Association with violating the Elkins Act, Title 49, United States Code, Section 41(1), by receiving discriminatory credit extensions on five rail shipments occurring between August, 1960 and April, 1961. On May 31, 1962, appellant's motion for judgment of acquittal at the conclusion of the Government's case was granted by the trial judge who stated: "I think in this case that there is no showing that the defendant did actually obtain a special concession or discrimina-

tion in its favor. That is the basis of the ruling." [R.T.P. p. 123.][1]

Information No. 31091-CD was filed on August 15, 1962, charging appellant with violating the Elkins Act by receiving discriminatory credit extensions on thirty rail shipments occurring between December, 1961 and February, 1962. On October 22, 1962, appellant entered pleas of not guilty to all counts and moved to dismiss the Information on the asserted ground that the matters contained therein had been previously adjudicated by case No. 30731-CD. Appellant's motion was denied on November 20, 1962, and on December 14, 1962, appellant was found guilty on all counts in a jury trial before the Honorable E. Avery Crary, United States District Judge. Appellant's alternative motions for a new trial or judgment of acquittal were denied on January 24, 1963, and on the same date appellant was sentenced to pay a fine of $1,000 on each count; execution of the sentence as to counts 21 through 30 was suspended. On February 1, 1963, appellant gave notice of appeal.

The District Court had jurisdiction to try the case under Title 18, United States Code, Section 3231. This Court has jurisdiction to entertain this appeal pursuant to the provisions of Title 28, United States Code, Sections 1291 and 1294.

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[1]R.T.P. refers to the reporter's transcript of the previous trial in case No. 30731-CD; R.T. refers to the reporter's transcript in case No. 31091-CD, from which this appeal is taken; C.T. refers to the clerk's transcript in the latter case.

II.

STATUTES AND REGULATIONS INVOLVED.

Title 49, United States Code, Section 41(1), provides in pertinent part that:

> "It shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said chapter [chapter 1] whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said chapter, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than $1,000 nor more than $20,000."

Title 49, United States Code, Section 3(2) provides in pertinent part that:

> "No carrier by railroad . . . subject to the provisions of this chapter shall deliver or relinquish possession at destination of any freight . . . transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to govern the settlement of all such rates and charges and to prevent unjust discrimination. . . ."

Interstate Commerce Commission Ex Parte Order No. 73, 49 C.F.R., Part 142 (1958), contains the following pertinent provisions:

Section 142.2: "Where retention of possession of freight by the carrier until the tariff rates and charges thereon have been paid will retard prompt release of equipment or station facilities, the carrier, upon taking precautions deemed by it to be sufficient to assure payment of the tariff charges within the credit period specified in this part may relinquish possession of the freight in advance of the payment of the tariff charges thereon and may extend credit in the amount of such charges to shippers for a period of 96 hours to be computed as set forth in this part."

Section 142.7: "Where the freight bill is presented to the shipper subsequent to the time the freight is delivered, the . . . 96-hour periods of credit shall run from the first 12 o'clock midnight following the presentation of the freight bill."

Section 142.9: "Shippers may elect to have their freight bills presented by means of the United States mails, and when the mail service is so used the time of mailing by the carrier shall be deemed to be the time of presentation of the bills. In case of dispute as to the time of mailing the post mark shall be accepted as showing such time."

Section 142.10: "In the computation of the various periods of credit Saturdays, Sundays, and legal holidays may be excluded, and where the time for presentation to shippers of freight bills for transportation and related charges falls on Satur-

day, Sunday or a legal holiday such bills may be presented prior to 12 o'clock midnight of the next succeeding regular work day."

Section 142.11: "The mailing by the shipper of valid checks, drafts, or money orders, which are satisfactory to the carrier, in payment of freight charges within the credit periods allowed such shipper may be deemed to be the collection of the tariff charges within the credit period for the purposes of the rules in this part. In case of dispute as to the time of mailing the post mark shall be accepted as showing such time."

Section 142.1b: "Effective on March 10, 1961, the rail carriers subject to the jurisdiction of the Interstate Commerce Commission are hereby authorized to extend credit for . . . 120 hours in respect of charges on carload traffic, in lieu of . . . 96 hours . . . under the present rules in this part, computation of time to be made in the same manner as provided in connection with the . . . 96-hour periods."

III.

STATEMENT OF FACTS.

During the period from December 8, 1961 to February 8, 1962, appellant made the thirty rail shipments, charged in the thirty counts of the Information, from Chicago, Illinois, to Los Angeles, California, by Southern Pacific Company, an interstate carrier subject to the Interstate Commerce Act. [R.T. 31-32, 220, Exs. 1-30, 1A-30A.] Of the thirty freight bills subsequently presented to appellant, five [Exs. 26A-30A; Counts 26-30] were paid by appellant on December

26, 1961, six to eleven days beyond the credit period allowed by the Interstate Commerce Commission; one [Ex. 25A; Count 25] was paid by appellant on March 22, 1962, 48 days beyond the period allowed; and the remaining twenty-four bills [Exs. 1A-24A; Counts 1-24] were still unpaid at the time of trial. [R.T. 107.] At the time the Information was drafted, the latter twenty-four freight bills had been unpaid for periods ranging from 151 to 168 days beyond the credit period allowed by the I.C.C.

Horace A. Sumner, terminal freight agent of the Southern Pacific Company at Los Angeles, California, testified that the Southern Pacific Company requires shippers who have been extended credit to pay bills for freight charges within 120 hours—excluding Saturdays, Sundays and holidays—after the bills are mailed out for payment. [R.T. 38.] Sumner said that several steps are taken by Southern Pacific Company to make certain that shippers know of and comply with the 120 hour credit period. When an application for credit is approved the applicant is sent a letter outlining the credit requirements together with a copy of the Interstate Commerce Commission order Ex Parte 73. [R.T. 44-45.] Before freight bills are mailed to shippers they are stamped to show the date they become delinquent. [R.T. 45-46.] After the bill is mailed, follow-up letters and telephone calls are used to notify shippers that a bill is due or delinquent. [R.T. 47-48.] As a final step, credit of a shipper who fails to pay within the required period is suspended. [R.T. 48.] The credit of appellant was suspended by Southern Pacific Company on two occasions. After the first suspension, credit was reinstated upon appellant's assur-

ance that payments in the future would be made within the credit period. [R.T. 48-49.]

A series of letters and a credit application sent to appellant gave notice of the period for which Southern Pacific Company could extend credit under I.C.C. regulations, and advised of appellant's failures to pay within the required period. [Exs. 31, 32, 32A, 33, 34, 35, 36, 38, 39, 40, 41, 42, 43; R.T. 99, 152.] Letters from appellant [Exs. 32A, 37; R.T. 99, 152] acknowledged that appellant was aware of the restrictions governing credit set down by the I.C.C. and agreed to abide by them.

Winfred J. Schafer, cashier for the Southern Pacific Company in Los Angeles, testified that in the year prior to December, 1962, Southern Pacific Company had several thousand shippers shipping into and out of Los Angeles. [R.T. 111-112.] There were approximately 100,000 freight bills issued in that year. [R.T. 112.] Ultimately, less than one percent—possibly one-tenth of one percent—of these freight bills were not paid within the required credit period. [R.T. 117.]

In Mr. Schafer's experience, appellant had been delinquent in the payment of its freight bills on more occasions, for longer periods of time, and in larger amounts of money than any other shipper. [R.T. 141-143.]

Louis C. Platz, assistant terminal freight agent of the Southern Pacific Company at Los Angeles, testified that on about February 6, 1962, he received a telephone call from Mr. Essaf, treasurer of Continental Shippers' Association, Media, Pennsylvania, in which Mr. Essaf advised that appellant would be going

through a reorganization and because of this would be a little slow in the payment of freight bills. Essaf asked that Southern Pacific Company be "understanding" about the matter. [R.T. 155-159.]

Howard A. Edwards, industrial agent for Southern Pacific Company, testified that on about October 24, 1960, he had a telephone conversation with Ron Denkler, appellant's Los Angeles manager, during the course of which Denkler advised that Mr. Schulman, head of Continental Shippers' Association, might route all future traffic by another carrier because Southern Pacific had suspended appellant's credit. [R.T. 160-164.]

W. H. Alexander, assistant to the auditor of freight accounts for the Southern Pacific Company in San Francisco, testified that appellant was delinquent in the payment of freight bills in the amount of $5,015.55 due at San Francisco in the year 1962. [R.T. 173-174.]

Lamoine F. Andreas, former general agent for the Southern Pacific Company at Philadelphia, Pennsylvania, testified that from about April, 1960 until about February, 1962, he and his subordinates contacted appellant about 75 to 100 times concerning freight bills that were not being paid on time. [R.T. 178, 186.] Appellant on many occasions advised Andreas that he could expect little or no difficulty in obtaining payment of freight bills on time in the future because appellant was going to take care of the matter. [R.T. 208-209.] On approximately 35 occasions Andreas was advised by appellant's representatives that appellant was mailing a check to cover a delinquent freight bill when in fact the check was not so mailed. [R.T. 185, 186.] On several occasions appellant threatened to take its business away from Southern Pacific Company if the

railroad gave appellant any further trouble on the matter of credit. [R.T. 186.] After appellant's credit was suspended in 1962, Andreas was given the assignment of collecting approximately $35,000 in delinquent freight charges from appellant. [R.T. 196, 197.] Appellant's representatives asked Andreas for more time in which to pay these bills. [R.T. 198.] Southern Pacific Company agreed not to bring suit for a period of time in which appellant could pay its bills. [R.T. 201-202.] On approximately June 5, 1962, appellant's representatives said it could not meet its obligations to Southern Pacific and suggested an installment type of payment. [R.T. 203.] Sometime prior to March 6, 1962, Mr. Ettelman, appellant's managing director, told Andreas that appellant had between $40,000 and $50,000 in the bank. [R.T. 205-206.]

A defense witness, Miss Lucy W. McCall, bookkeeper for appellant, identified financial statements of appellant. [Exs. D-P.] She said that appellant ships for its members who in turn pay appellant later, and that the largest debts outstanding to appellant are owed by its members. [R.T. 352-353.] One of appellant's financial problems is past due accounts of its members. [R.T. 354-355.]

Irwin Ettelman, appellant's former managing director identified a compilation showing whether checks in payment of freight bills during the period June 16, 1960, to May 12, 1961, were written before or after the bills became delinquent. [Ex. Q.] From its inception appellant was in poor financial condition. [R.T. 379.] Ettelman realized that appellant might not be able to pay its freight charges on time, but went ahead and shipped anyway. [R.T. 380-381.] Appellant al-

lows its members 48 hours to pay freight charges but only about 20 per cent pay within that time. [R.T. 386.]

IV.

SUMMARY OF ARGUMENT.

A. The Elkins Act Is to Be Broadly Interpreted to Achieve Its Purpose of Preventing Discrimination in Interstate Commerce.

B. Appellant's Prosecution Was Not Barred by Previous Adjudication.

1. The Doctrine of Double Jeopardy Does Not Apply.
2. The Doctrine of Collateral Estoppel or Res Judicata Does Not Apply.

C. The Evidence as to All Essential Elements of the Offense Was Sufficient to Sustain Appellant's Conviction.

1. The Government Proved Appellant's Acts of Causing Property to Be Transported in Interstate Commerce by a Common Carrier.
2. The Government Proved Appellant's Act of Soliciting, Accepting or Receiving, in Respect to Such Transportation, a Concession or Discrimination Whereby an Advantage Was Obtained and Discrimination Practiced.
3. The Government Proved That Appellant Knew It Was Obtaining the Particular Concessions and Discriminations Involved.

D. The Trial Court Did Not Err in Receiving Evidence.

1. Exhibits 31, 33, 34, 35, 36, 38, 39, 40, 41, 42 and 43 Were Properly Admitted Into Evidence.
2. Testimony Received Did Not Violate the Best Evidence Rule.
3. Evidence of a Telephone Conversation With a Representative of Appellant Was Properly Received.

E. The Court Did Not Err in the Giving or Refusing of Instructions.

1. Instructions as to I. C. C. Regulations Were Properly Given.
2. The Instruction as to What Constitutes a "Concession" or "Discrimination" Was Correct.
3. The Court's Instruction on Intent Was Correct.
4. The Court's Instruction With Respect to Knowledge of or Collusion by the Carrier Was Correct.
5. The Court Correctly Instructed on the Law of Agency.
6. The Court Correctly Instructed With Respect to Discrimination and "Unjust" Discrimination.
7. The Court Was Correct in Refusing Appellant's Proposed Instruction No. 19.
8. The Court Was Correct in Refusing Appellant's Proposed Instruction No. 23.
9. The Court Correctly Refused Appellant's Proposed Instruction No. 26.

V.

ARGUMENT.

A. The Elkins Act Is to Be Broadly Interpreted to Achive Its Purpose of Preventing Discrimination in Interstate Commerce.

The Elkins Act was enacted to eliminate concessions or discriminations from the handling of commerce so that persons and places might carry on their activities on an equal basis. Favoritism which destroys equality between shippers, however brought about, is not tolerated. It is the object of the Act to require equal treatment of all shippers and prohibit unjust discrimination in favor of any of them, to prevent favoritism by any means or device whatsoever, to prohibit practices which run counter to the purpose of the Act to place all shippers on equal terms, and to cut up by the roots every form of discrimination, favoritism, and inequality.

Union Pacific Railroad Co. v. United States, 313 U. S. 450, 461-462 (1941);

United States v. Union Stock Yards, 226 U. S. 286, 307, 309 (1912);

Louisville & Nashville v. Mottley, 219 U. S. 467 (1911).

The Supreme Court has said of the Elkins Act, in *United States v. Koenig Coal Co.,* 270 U. S. 512 at 519 (1926), that "the general rule that criminal statutes are to be strictly construed has no application when the general purpose of the legislation is manifest and is subserved by giving the words used in the statute their ordinary meaning and thus covering the acts charged."

B. Appellant's Prosecution Was Not Barred by Previous Adjudication.

1. The Doctrine of Double Jeopardy Does Not Apply.

A defendant cannot be further prosecuted for an offense of which he has once been acquitted. *Green v. United States,* 355 U. S. 184 (1957). However, to constitute double jeopardy, it is not enough that the second prosecution arise out of the same or similar facts as the first; the second prosecution must be for the exact same offense, and the general test of the identity of offenses is whether identical evidence is required to sustain them. *Gore v. United States,* 357 U.S. 392 (1958); *Morgan v. Devine,* 237 U.S. 632 (1915); *Bacom v. Sullivan,* 200 F.2d 70 (5th Cir. 1952); *cert. denied* 345 U.S. 910 (1953); *Williams v. United States,* 179 F.2d 644 (5th Cir. 1950); *cert. denied* 341 U.S. 70 (1951); *La Page v. United States,* 146 F.2d 536 (8th Cir. 1945).

In the present case there is no double jeopardy since the shipments in connection with which appellant was charged with receiving concessions in Information 30731-CD are entirely different shipments from those involved in case No. 31091-CD. The cases uniformly hold that each shipment, or each payment for shipments, on which a concession is received constitutes a separate and distinct offense. *Grand Rapids & I. Ry Co. v. United States,* 212 Fed. 577 (6th Cir. 1914); *cert. denied* 234 U.S. 762 (1914); *United States v. Standard Oil of N.Y.,* 192 Fed. 438 (S.D.N.Y. 1911); *United States v. Standard Oil Co.,* 170 Fed. 988 (N.D. Ill. 1909); *United States v. Bunch,* 165 Fed. 736 (D. Ark. 1908); *United States v. Stearns Salt & Lumber Co.,* 165 Fed. 735 (D.C. Mich. 1908); *United States v. Vacuum Oil Co.,* 158 Fed. 536 (S.D.N.Y. 1908).

2. The Doctrine of Collateral Estoppel or Res Judicata Does Not Apply.

In *Frank v. Mangum,* 237 U.S. 309, 333-334 (1915) the Supreme Court said:

> "It is a fundamental principle of jurisprudence . . . that a question of fact or of law distinctly put in issue and directly determined by a court of competent jurisdiction cannot afterwards be disputed between the same parties. * * * The principle is as applicable to the decisions of criminal courts as to those of civil jurisdiction."

To the same effect is *United States v. Oppenheimer,* 242 U.S. 85, 87 (1917). See also *Cosgrove v. United States,* 224 F.2d 146 (9th Cir. 1955).

The area in which the doctrine of collateral estoppel applies is very narrow. As was said in *United States v. Rangel-Perez,* 179 F. Supp. 619, 622-623 (S.D. Cal. 1959):

> "To be conclusive in a subsequent criminal proceeding by virtue of the doctrine of collateral estoppel, the facts determined by the earlier judgment must of course have been fully tried and necessarily adjudicated in order to reach judgment on the issues involved in the essential elements of the crime charged."

The criminal cases in which the doctrine of collateral estoppel has been held a *bar* to subsequent prosecutions are only those in which an *essential element* of the second charge has already been adjudicated adversely to the Government. As was said in the case of *United States v. Kenny,* 236 F.2d 128 (3d Cir. 1956), where an accused is charged with two related

offenses arising from the same facts, his acquittal on one charge precludes his subsequent prosecution on the other charge only if the acquittal was the result of a decision in his favor on an issue which would be essential to the case against him on the second offense. One example of cases within this category is *United States v. Carlisi,* 32 F. Supp. 479 (E.D.N.Y. 1940), in which, in a prosecution for conspiracy to set up stills, testimony of agents who had made a search and seizure which were held illegal in a previous prosecution of the defendant on a charge of possessing the still, was held inadmissible because the decision that the search and seizure were illegal was "res judicata" of the rights of the parties. Other cases in this category include *Yawn v. United States,* 244 F.2d 235 (5th Cir. 1957); *United States v. Simon,* 225 F.2d 260 (3d Cir. 1955); *Cosgrove v. United States,* 224 F.2d 146 (9th Cir. 1954); *Sealfon v. United States,* 332 U.S. 575 (1948); *United States v. Meyerson,* 24 F.2d 855 (S.D.N.Y. 1928); and *United States v. McConnell,* 10 F.2d 977 (E.D. Pa. 1926).

Where proof of an essential element of a subsequent prosecution is not precluded by virtue of that issue's adjudication in a previous case between the same parties, the doctrine of collateral estoppel may still apply, not as a bar to the second prosecution, but when the Government attempts to relitigate an issue determined by the previous case, which is not necessarily an essential element of the subsequent case. An illustrative case is *United States v. Maybury,* 274 F.2d 899 (2d Cir. 1960), in which it was said that a previous acquittal on an indictment for the forgery of a United States Treasury Check would not operate as

res judicata in the trial of the same defendant on a subsequent indictment for uttering the same forged check. The Government would only be estopped from contending that the defendant himself had forged the check.

The narrow scope of the doctrine of collateral estoppel is well illustrated by a third group of cases in which the doctrine was held not to apply even though the successive prosecutions involved arose out of the same transaction or were closely related. In *Williams v. United States,* 170 F.2d 319 (5th Cir. 1948), a defendant's acquittal at a former trial for receiving certain sugar in exchange for ration stamps which he knew were acquired unlawfully, was held not to constitute *res judicata* with respect to a second prosecution charging the unlawful acquisition, use and transfer of the same ration stamps. *United States v. Kaadt,* 171 F.2d 600 (7th Cir. 1949), held that where a defendant was acquitted of the offense of using the mails to defraud by advertising a treatment for diabetics, the acquittal was not *res judicata* in a subsequent prosecution for the shipment of misbranded drugs for the cure of diabetics, where the intent to defraud was not an essential element of the latter offense. *United States v. Kenny,* 236 F.2d 128 (3d Cir. 1956), involved a defendant who, in a prior prosecution of the members of his partnership, was acquitted on a charge of making false statements to a Government agency about contracts. This acquittal was held not to be *res judicata* in a subsequent prosecution against the defendant for having concealed his interest in the contracts as a partner, since the jury could have based its acquittal on the ground that he lacked criminal intent in making the false statement, rather than on the basis that he was not a partner.

From examination of the cases in the three categories mentioned above it is evident that the relationship of cases No. 30731-CD and No. 31091-CD bears no resemblance to that of the cases where the doctrine of collateral estoppel has been held to apply. The offenses charged in No. 30731-CD are no more similar to those charged in No. 31091-CD that would be the offenses charged against a bank robber who had robbed the same bank on occasions several months apart by using the same *modus operandi.*

There are no facts or issues in the present case No. 31091-CD which were determined or adjudicated in previous case No. 30731-CD. To illustrate this point, each element of the present case is discussed below with respect to what was at issue in the previous case.

(1) *Defendant's Causing to Be Made, the Specific Interstate Rail Shipments Involved.*

In the previous case, the shipments were five specific ones occurring during the period August, 1960 to April, 1961.

In the present case, the shipments were thirty specific ones occurring during the period December, 1961, to February, 1962. These entirely different facts were proved by entirely different evidence.

(2) *Defendant's Obtaining a Discriminatory Concession With Respect to the Specific Shipments Involved.*

In the previous case the Government offered evidence to prove that appellant received discriminatory credit extensions on sums of money due on the Au-

gust, 1960, to April, 1961, shipments, which credit extended for periods ranging from 41 to 13 days beyond the 96-hour period allowed by I.C.C. regulations.

In the present case, the Government offered evidence to prove that appellant received discriminatory credit extensions on entirely different sums of money due on the entirely different shipments occurring during December, 1961, to February, 1962, which credit extended for entirely different periods ranging from 168 to 6 days beyond the new 120-hour period allowed by I.C.C. regulations.

(3) *Defendant's Knowledge That It Was Receiving Discriminatory Concessions on the Specific Shipment Involved.*

In the previous case the Government offered evidence to prove that appellant knew it was receiving discriminatory credit extensions on specific sums due on specific shipments.

In the present case, the Government offered evidence to prove that appellant knew it was receiving discriminatory credit extensions on entirely different sums due on entirely different shipments.

In view of the differences between the facts and issues involved in the previous prosecution and those in the present case, it is obvious that case No. 30731-CD could not and did not determine or adjudicate any fact or issue involved in Case No. 31091-CD.

C. The Evidence as to All Essential Elements of the Offense Was Sufficient to Sustain Appellant's Conviction.

1. The Government Proved Appellant's Acts of Causing Property to Be Transported in Interstate Commerce by a Common Carrier.

This element of the Government's case was established by stipulation. [R.T. 31-32, 220.]

2. The Government Proved Appellant's Acts of Soliciting, Accepting or Receiving, in Respect of Such Transportation, a Concession or Discrimination Whereby an Advantage Was Obtained and Discrimination Practiced.

Appellant "solicited" the credit extensions it obtained through its failure to pay freight bills within the required credit period by the following acts: (1) agreeing to abide by I.C.C. credit regulations if credit were given to appellant [Ex. 32A]; (2) shipping with the knowledge that appellant might not be able to pay its freight bills within the required period [R.T. 380-381]; (3) threatening to take its business away from Southern Pacific if appellant's credit was suspended for failure to pay on time, or if appellant were given any further trouble on the matter of credit [R.T. 160-164, 186]; (4) asking the carrier to be "understanding" about appellant's lateness in paying freight charges caused by a company reorganization [R.T. 155-159]; (5) advising the carrier who was inquiring about payment of delinquent bills, that a check in payment thereof was being mailed that day when in fact the check was not being mailed [R.T. 185, 186]; (6) advising the carrier that appellant's bank balance was larger than it really was [R.T. 205-206, 345]; (7) asking the

carrier for more time in which to pay the $35,000 in delinquent freight charges it was trying to collect [R.T. 198]; and (8) agreeing that the carrier would not sue for delinquent freight charges during a period in which appellant would try to pay them. [R.T. 201-202.]

Appellant "received" or obtained credit extensions beyond the 120-hour limit allowable by shipping its freight and not paying therefor until some six to 168 days beyond the allowable limit. [Exs. 1A-30A; R.T. 31-32, 107.]

The credit extensions appellant obtained constitute "concessions" or "discriminations" because appellant obtained them while other shippers did not. Southern Pacific was forbidden to give such extensions to other shippers by the Interstate Commerce Act, 49 U.S.C. §3(2), and I.C.C. Ex Parte Order 73 made pursuant thereto; and it is presumed that the law was obeyed. *Cavness v. United States,* 187 F.2d 719, 723 (9th Cir. 1951), *cert. denied,* 341 U.S. 951 (1951). In addition, it was shown that about 99.9 per cent of Southern Pacific freight bills were paid within the required credit period. [R.T. 117.]

By obtaining credit extensions not available to other shippers an "advantage" was obtained by appellant and a "discrimination" was practiced against other shippers in that the credit extensions permitted appellant to operate on Southern Pacific Company's capital without interest and gave appellant time to attempt to collect from its members the money for freight charges due the railroad. Other shippers who paid within the credit period had to operate on their own capital or money borrowed with interest.

3. The Government Proved That Appellant Knew It Was Obtaining the Particular Concessions and Discriminations Involved.

Appellant's knowledge that there were limitations on the period of credit available to railroad shippers, and that when appellant failed to pay in the required period it was receiving credit that was not available to other shippers, is shown by the following:

(a) *Exhibit 32A,* appellant's application for credit dated June 15, 1960, states:

> "On behalf of Company, I certify we are familiar with and agree to abide by the Interstate Commerce Commission Rules and Regulations pertaining to the payment of transportation and other tariff charges as set forth on the *reverse side* of this credit application form. It is further understood that under the law a carrier is required to discontinue further credit when a patron violates the time allowed for payment of tariff charges."

(b) *Exhibit 31,* a letter to appellant dated August 22, 1960, before its credit was approved, states:

> "Our records indicate that your settlement of freight transportation charges are [sic.] not being made within the authorized credit period, as prescribed by order of the Interstate Commerce Commission.
>
> "Date of delinquency is imprinted on all freight bills; therefore, your sub-departments can readily detect the due date.
>
> "The law requires both shipper and carrier to comply with the order and provides heavy penalties for violation. * * *"

(c) *Exhibit 32,* a notice of appellant's credit approval dated August 30, 1960, states:

> "Since credit extended to patrons by rail carriers is subject to regulations and time limitations prescribed by the Interstate Commerce Commission, copy of the Commission's Order Ex Parte 73 covering the subject is enclosed for your information and guidance."

(d) *Exhibit 33,* a letter to appellant, dated September 23, 1960, states:

> "We wrote you on 8-22-60, calling attention to delay in receipt of settlement for freight transportation charges. Delinquencies are still continuing and we are again requesting your co-operation.
>
> "We have previously advised you that it is unlawful for carriers to extend credit beyond the period provided by the rules of the Interstate Commerce Commission. Representatives of the I.C.C. are constantly investigating the records of rail carriers to ascertain if there have been any violations of the law in respect to preference or advantages allowed one shipper over another through the extension of credit, or otherwise contrary to the orders of the Interstate Commerce Commission. Heavy penalties for such violations may be imposed on shipper (consignee or consignor) as well as on the carrier.
>
> "Continuation of credit is contingent upon settlements being made within the prescribed period and we would regret exceedingly the necessity of suspending your credit, but if delays in payment continue we will have no alternative."

(e) *Exhibit 34,* a notice of credit suspension, dated October 25, 1960, states:

> "Your attention has heretofore been called to the fact that our records indicate you were not making settlement of transportation charges, in all cases, within the authorized credit period, as prescribed by order of the Interstate Commerce Commission.
>
> "Inasmuch as you are still not settling such transportation charges within the credit period prescribed, we are, in order to protect the carriers as well as your selves against a possible indictment under the law, effective immediately, removing your name from our credit list and requiring payment of charges on 'Collect' shipments consigned to you, and 'Prepaid Shipments' forwarded by you, before delivery or forwarding of such shipments.
>
> "This action is not intended as a reflection on your financial stability, but it is resorted to as a means of preventing possible prosecution and fine which may be assessed against both patron and carrier for violation of the Commission's order.
>
> "Should you at any future time desire reinstatement on the credit list, your request in writing will be given due consideration provided there are no delinquent unpaid charges and your assurance is given in writing that payment of future charges will be made within the authorized credit period."

(f) *Exhibit 35,* a letter to appellant dated January 31, 1961, after its credit was reinstated, similar to Exhibit 33, warns appellant of delinquencies.

(g) *Exhibit 36,* a letter to appellant dated February 16, 1961, similar to Exhibits 33 and 35 warns appellant of delinquencies.

(h) *Exhibit 37,* a letter from appellant's managing director to the Freight Agents' Association of Los Angeles, dated March 6, 1961, states:

> "This will acknowledge your letter of February 16, 1961. It was my opinion that all freight charges due were being paid in the published period of time. I would appreciate it if you would call to my personal attention any freight bill that is paid beyond your credit period so that the proper steps can be taken to correct the situation immediately.
>
> "I am well aware of the restrictions governing your credit allowance set down by the Interstate Commerce Commission and I can assure you we will make every effort to adhere to them."

(i) *Exhibit 38,* a letter to appellant dated March 13, 1961, states:

> "Our records indicate that your settlement of freight transportation charges, is not being made within the authorized credit period as prescribed by order of the Interstate Commerce Commission. *The law requires both shipper and carrier to comply with the order, and provides heavy penalties for violations.* The following bills are unpaid and past due: . . . Please forward your check by RETURN MAIL."

(j) *Exhibit 39,* a letter to appellant dated March 16, 1961, similar to Exhibits 33, 35, and 36, warns appellant of delinquencies.

(k) *Exhibit 40,* a letter to appellant dated November 29, 1961, similar to Exhibits 33, 35, 36 and 39, warns appellant of delinquencies.

(l) *Exhibit 41,* a letter to appellant dated December 29, 1961, similar to Exhibits 33, 35, 36, 39 and 40, warns appellant of delinquencies.

(m) *Exhibit 42,* a letter to appellant dated January 15, 1962, similar to Exhibit 38, contains the statement:

> "Forward your check by RETURN MAIL to prevent SUSPENSION of credit."

(n) *Exhibit 43,* a notice of credit suspension dated February 6, 1962, similar to Exhibit 34.

(o) Mr. Andreas and his subordinates contacted appellant about 75 to 100 times concerning freight bills that were not being paid on time. [R.T. 178, 186.] Appellant's representatives were informed that it was important to pay freight bills on time. [R.T. 208-209.]

In view of the items mentioned above, it is plain that the evidence was more than sufficient to sustain appellant's conviction, especially since on appeal the evidence is taken in the light most favorable to the Government. *Glasser v. United States,* 315 U.S. 60 (1942); *Bolen v. United States,* 303 F.2d 870 (9th Cir. 1962); *Young v. United States,* 298 F.2d 108 (9th Cir. 1962), *cert. denied* 370 U.S. 953 (1962); *Benchwick v. United States,* 197 F.2d 330 (9th Cir. 1961); *Teasley v. United States,* 292 F.2d 460 (9th Cir. 1961); *Sandez v. United States,* 239 F.2d 239 (9th Cir. 1956).

D. The Trial Court Did Not Err in Receiving Evidence.

1. Exhibits 31, 33, 34, 35, 36, 38, 39, 40, 41, 42 and 43 Were Properly Admitted Into Evidence.

The above exhibits were offered by the Government to show that appellant knew it was not paying its bills within the credit period required of all shippers, and not to prove what the law is. [R.T. 82-83, 92, 95, 98-99.] The Government said:

> "We are not offering it [Ex. 31], to prove to the jury what the law is. We will draft to the court an instruction telling them very plainly that it is offered—this letter is offered to show the Continental Shippers received this letter notifying them they are not paying on time." [R.T. 82-83.]

Counsel for appellant objected to the introduction of the above exhibits on the ground that they contain "prejudicial" "conclusions of law." [R.T. 82, 84, 89-90, 91, 95-96.]

The court said:

> "The objections are overruled and the Court will instruct the jury these references as to law are not to be considered by them in any sense or to any degree.
>
> "The Court will instruct them as to the law and that the letters are not to be considered by them as evidence of what the law is in any sense of the word." [R.T. 97.]

Thereafter, the Court instructed the jury as follows:

> "Now ladies and gentlemen, these exhibits require some explanation. Exhibit No. 31, in the

exhibit there is a statement, 'The law requires both shipper and carrier to comply with the order and provides heavy penalties for violations.'

"I instruct you you are not to consider in any respect any statement in any of these exhibits as to what the law is. The Court will instruct you as to the law to be applied by you, as to what the law is with respect to these charges before the case is finally submitted to you.

But I instruct you now you are not to consider anything that you read in any of these exhibits concerning what the law is. You are to disregard it entirely.

In Exhibit 33 there is the provision, a statement, 'We have previously advised you that it is unlawful for carriers to extend credit beyond the period provided by the rules of the Interstate Commerce Commission.'

"All of these statements—I was merely giving you an example—and any statement which purports to set forth what the law is you are to disregard entirely. Is that clear?" [R.T. 99-100.]

In its argument of the case, the Government made the following remarks to the jury while discussing Exhibits 31 through 43:

"There is a brief paragraph with respect to the law and the Court has already instructed you to disregard what this paragraph says and take the law from the Court's instructions, so I won't read that to you." [R.T. 429.]

* * * * *

"I will not read that part dealing with the law, because the Court has instructions to you as to what to do with those." [R.T. 431.]

* * * * *

". . . and again disregard the statement as to what the law is . . ." [R.T. 432.]

An admissible document is not made inadmissible because it contains some incompetent matter. *Baltimore & O.R.R. v. Filgenhower,* 168 F.2d 12, 17 (8th Cir. 1948); *England v. United States,* 174 F.2d 466 (5th Cir. 1949). The clear instructions of the Court which were carefully followed by Government counsel adequately safeguarded appellant against possible prejudice from the "conclusions of law" to which appellant objected, and the admission into evidence of Exhibits 31, 33, 34, 35, 36, 38, 39, 40, 41, 42 and 43 was therefore not error.

2. Testimony Received Did Not Violate the Best Evidence Rule.

During the course of the trial, the Government asked the following questions and received the following answers:

"Q. Now, Mr. Schafer, in your business, in the course of your duties there at the Southern Pacific Company, in the Cashier's Office, have you become at all familiar with the manner in which shippers generally pay their bills, whether late or early? A. Yes." [R.T. 110.]

Counsel for appellant made the following objection:

"If the Court please, the records of the Southern Pacific Company are the best evidence of the answer to that question. I object to that on that ground." [R.T. 110.]

The Court overruled the objection [R.T. 111] and the Government asked the following question:

> "Q. Now, about what percentage of all those freight bills that you handle [Southern Pacific's Los Angeles freight bills for the preceding year] are paid within this 120-hour period, as best you can estimate? [R.T. 112-113.]

Counsel for appellant interposed the following objection:

> "We object, your Honor, on the ground it calls for the conclusion of this witness. Percentage would not be material. The defendant in this case is charged with unjust discrimination, and I emphasize the word 'unjust.' * * * The records of the Southern Pacific Company are the best evidence of when the shippers pay, how much they pay, when they pay and if it is the date or after the date as stamped on the invoice. * * *
>
> This calls for a conclusion of this witness. The records of the Southern Pacific Company will indicate whether this shipper was treated different than all the rest." [R.T. 113.]

The Court overruled the objection [R.T. 114] and the witness then said that approximately 95 per cent [R.T. 114] and ultimately 99.9 per cent [R.T. 117] of freight bills mailed are paid within the credit period.

Appellant's objections above and its specification of error No. 7 (Appellant's Opening Brief, p. 27) show that appellant contends the above testimony was received contrary to the "best evidence" rule.

As applied in Federal Courts, the "best evidence" rule is limited to cases where the contents of a writ-

ing are to be proved. *Keene v. Meade,* 28 U.S. 1 (1830); *Herzig v. Swift & Co.,* 146 F.2d 444 (2d Cir. 1945); *In re Ko-Ed Tavern,* 129 F.2d 806 (3d Cir. 1942); *R. Hoe & Co. v. Corvir,* 30 F.2d 630 (2d Cir. 1929); *Boitano v. United States,* 7 F.2d 324 (9th Cir. 1925). The "best evidence" rule amounts to no more than the requirement that the contents of a writing must be proved by the introduction of the writing itself. *Herzig v. Swift & Co., supra.*

In *Meyers v. United States,* 171 F.2d 800 (D.C. Cir. 1948), *cert. denied* 69 S. Ct. 602 (1949), it was held that oral testimony of a person who heard statements of the defendant made before a Congressional Committee was admissible to establish what the defendant said in his statements, even though a reporter's transcript of the statements was also available, because the oral testimony was not offered to prove what was in the transcript, but what the defendant had said. The same result was reached in *Brzezinski v. United States,* 198 Fed. 65 (2d Cir. 1912), as to the oral testimony of a person who heard the defendant's statements made before a Grand Jury, which statements were also contained in a reporter's transcript. To the same effect is *Boitano v. United States,* 7 F.2d 324, 325 (9th Cir. 1925), in which the Court said ". . . it was equally competent to prove . . . testimony by a witness who was present at the trial and heard the testimony given, regardless of whether the testimony was reported or whether it was not."

The Court in *In re Ko-Ed Tavern,* 129 F.2d 806, 810 (3d Cir. 1942), held that oral testimony as to who owned the shares of a bankrupt corporation was admissible, and that the matter need not be proved

by the books of the corporation. The Court further stated that the "best evidence" rule was not involved since the oral testimony was not offered to establish the terms of a writing.

In *United States v. Kushner,* 135 F.2d 668, 674 (2d Cir. 1943), *cert. denied* 320 U.S. 212 (1943), it was held that oral testimony to the fact that a withdrawal had been made from a bank was admissible even though a written bank statement showing the withdrawal was available, since the oral testimony was not offered to prove what was in the written statement, but merely what had occurred.

In *Gantz v. United States,* 127 F.2d 498 (8th Cir. 1942), in a prosecution of a manager of a brokerage company for violating the Securities Act, testimony of a witness as to what equity was in her account at a particular time was held admissible, and not objectionable on the ground that a written record was the best evidence.

In *United States v. Waldin,* 253 F.2d 551 (3rd Cir. 1958), it was held that the "best evidence" rule does not require the best possible evidence to prove a given point, but is properly confined to situations where the contents of a writing are in issue.

The Government did not elicit the testimony of Mr. Schafer to show the contents of Southern Pacific Company's records, but to prove the fact of what had occurred with respect to the payment of freight bills. In view of this, the "best evidence" rule had no application and the testimony was properly received.

Appellant also alleges that error was committed in receiving the testimony of Horace A. Sumner contrary

to the "best evidence" rule. During the trial, the Government asked the following questions and received the following answers:

> "Q. Mr. Sumner, in the course of your duties have you had any occasion to become aware or familiar with the manner in which the defendant corporation has been paying its bills. A. Yes." [R.T. 63.]

Counsel for appellant interposed an objection as follows:

> "The Court please, I think the record will speak for itself in that respect. I object to the conclusion of this witness, paraphrasing his thoughts as to what the record has been." [R.T. 63.]

Thereafter, the following colloquy took place:

> "The Court: Won't the record show it?
>
> Mr. Nissen: What record, your honor? The fact of payment—[R.T. 63.]
>
> The Court: When these bills were actually paid.
>
> Mr. Nissen: The Government is not confined to the bills in issue in the case, we believe, and we want to show there have been. . . . [R.T. 64.]
>
> The Court: You are trying to show knowledge?
>
> Mr. Nissen: The Government is charged with showing knowledge.
>
> The Court: That is what you are trying to show?
>
> Mr. Nissen: That is right. In order to show knowledge we are entitled to show prior acts of similar nature. [R.T. 64.] * * *
>
> The Court: Knowledge of what?
>
> Mr. Nissen: Knowledge of the fact that they

were [R.T. 64] paying late, they were late, delinquent. They were receiving credit that was not allowed or obtainable by others.

The Court: What is the best evidence to show that?

Mr. Nissen: This is not a best evidence problem. It is not a document in issue. In other words, we are not trying to show the contents of a document. Payment late or early is a fact independent of documents.

The Court: You are asking this witness for information that is documented, aren't you?

Mr. Nissen: If we have to, we could bring up a carload, every single communication on every single shipment and show it to the Court. We have made a study of this and it is voluminous. You just can't do it. [R.T. 65.]

* * * * *

The Government is not trying to prove any specific shipment was late. It wants to prove the pattern of paying late, and that they had notice—

The Court: You don't prove a pattern by just a shotgun question. You prove a pattern by showing in various instances they did this and that is the pattern.

Mr. Nissen: Is it the Court's position I have to show they were late in each instance?

The Court: It all depends on what the witness can testify to I am not going to let him testify in great generalities. What you should have done is have him make a summary. [R.T. 66.]

* * * * *

Mr. Nissen: . . . . Personally sir, I feel the Court is confusing best evidence with a person's ability—

The Court: You are talking about a pattern. You say you are trying to prove a pattern. What is a pattern?

Mr. Nissen: They were habitually late in payment, chronically late in payment. . . . [R.T. 67.]

The Court: Doesn't he know they were late in payments so many times?

Mr. Nissen: Not specifically, because—

The Court: Why didn't he look into it and find out?

Mr. Nissen: They made the study for the one period. They haven't made the study prior—

The Court: You are talking about this one period. Are you talking about prior to the period of the study?

Mr. Nissen: I was going to ask him for the whole period, when they started the period.

* * * * *

The Court: I think you ought to be limited to the period he made a statement. [R.T. 68.]

* * * * *

The Court: My position is he has to have made a study to know what he is talking about, rather than just basing it on—

Mr. Nissen: He had day-to-day contact with it He knows there is no other shipment—

The Court: He has had day-to-day contact and if he has made a study of it, he knows. I will limit it to the time he made the study." [R.T. 69.]

Counsel for appellant questioned witness Sumner on *voir dire* and made the objection indicated below:

> "Mr. Stevens: Mr. Sumner, you referred to a study.
>
> Did that study result in writing a compilation?
>
> The Witness: Yes, it did.
>
> * * * * *
>
> Mr. Stevens: I think if that be the case then, the court please, the study would be the best evidence and not the witness' testimony of the fact.
>
> Mr. Nissen: The Government still says that this is not a best-evidence problem. We are not trying to prove what is in the study, we are trying to prove independent facts, payments or not." [R.T. 70.]

Thereafter, the Court overruled appellant's objection [R.T. 74] and the following question and answer ensued:

> "Q. . . . Will you tell us approximately how many delinquencies were covered by the studies and up to the time of the charge? A. Approximately 87 delinquencies." [R.T. 75.]

Inasmuch as Sumner's testimony was elicited to prove appellant's prior failures to pay within the credit period, rather than to prove what was contained in the written compilation resulting from a "study" of appellant's delinquent payments, the "best-evidence" rule has no application. The "study" was not asked about or even mentioned until counsel for appellant objected to Sumner's oral testimony as to appellant's previous delinquencies based on his own experience in handling appellant's account, on the ground that it was not the best evidence. After this objection, the Court sought

to confine the witness' testimony to matters of which he had made a "study" stating: "My position is he has to have made a study to know what he is talking about. . . ." [R.T. 69.]

Even if witness Sumner's testimony is viewed as an oral statement of what the written compilation resulting from the study contained, there would be no error since: (1) the writing was made by Sumner's office under his supervision and control [R.T. 71] (2) the writing was marked for identification and handed to appellant's counsel [R.T. 73] (3) the records from which the written compilation was made were ordered made available if appellant's counsel wished to see them. [R.T. 70.] Thus, the written compilation would qualify as a proper summary of voluminous records under cases such as *Stevens v. United States,* 206 F.2d 64, 67 (6th Cir. 1953).

Even if the Court erred in receiving Sumner's testimony referred to above, the error was harmless, especially since appellant introduced a compilation [Defense Ex. Q; R.T. 364] which showed appellant was delinquent in paying its freight bills on at least 75 occasions between December, 1960 and May, 1961—virtually the same as the evidence to which Sumner testified.

3. Evidence of a Telephone Conversation With a Representative of Appellant Was Properly Received.

The issue raised by appellant's specification of error No. 8 (Appellant's Op. Br. pp. 27-28) is whether a telephone conversation allegedly emanating from appellant was properly authenticated. Mr. Platz, assistant terminal freight agent for Southern Pacific Company, testified that on February 6, 1962, he received a tele-

phone call from an individual who identified himself as Mr. Essaf, Treasurer of Continental Shippers' Association. The call was originally placed for Mr. Sumner, the freight agent, who was out. The caller stated that there would be a reorganization of Continental Shippers' Association, and because of this the association would be a little slow in the payment of its bills. The reorganization and lateness in payment later occurred as the caller said they would. [R.T. 153-158; See also Ex. 44.] After this foundation was laid, the court allowed the substance of the conversation to be given. [R.T. 158.]

A leading case on this issue is *Van Riper v. United States,* 13 F.2d 961, 968 (2d Cir. 1926), which involved the authentication of telephone calls by persons identifying themselves as representatives of the defendant. In an opinion by Judge Learned Hand, the Court held that the callers were sufficiently identified by the circumstances and substance of the conversation itself, inasmuch as the calls were placed to persons with whom the defendants had been dealing, and the calls concerned a subject (the selling of Parco stock) which only the defendants were likely to be concerned with. See also *Hartzell v. United States,* 72 F.2d 569, 578 (8th Cir. 1954); and *Jarvis v. United States,* 90 F.2d 243, 245 (1st Cir. 1937).

In the present case, the telephone call was placed to a company (and a particular person within that company) with which appellant had been dealing. The subject of the telephone conversation was one which only appellant was likely to be concerned with. Matters forecasted in the telephone conversation indicated inside knowledge of appellant's operations, and these

matters subsequently occurred as predicted. These circumstances constitute sufficient proof of the identity of the caller as a representative of appellant.

As was said in *United States v. Lo Bue,* 180 F. Supp. 955 (S.D.N.Y. 1960), where the foundation proof consists of an aggregate of circumstances establishing that it is highly improbable that the caller was anyone other than who he purported to be, there is sufficient proof of the identity of the speaker.

E. The Court Did Not Err in the Giving or Refusing of Instructions.

1. Instructions as to I.C.C. Regulations Were Properly Given. [Government's Proposed Instruction, Set 2, No. 3, C. T. 131, as Modified and Given by the Court at R. T. 501-504].

Appellant objected to instructions on Interstate Commerce Commission regulations pertaining to credit for freight charges on the ground that the regulations were not material. [R.T. 265.] However, these regulations were in existence, and when coupled with the presumption that the law has been obeyed, they tended to show that credit of other shippers had been restricted to the period permitted by the regulations while appellant obtained credit for longer periods—thus indicating a discrimination had been practiced and an advantage obtained.

Those who obtain benefits in respect to rail transportation contrary to the rules of the Interstate Commerce Commission have been convicted of Elkins Act Violations. Thus, In *Dye v. United States,* 262 Fed. 6 (4th Cir. 1919), in which a rule of the I.C.C. provided for distribution of railroad cars among various mines, a person who obtained more cars than he was

entitled to under the rule was held to have violated the Elkins Act. Also, in *United States v. Michigan Portland Cement Company,* 270 U.S. 521 (1926), where the I.C.C. had promulgated a priority order concerning coal cars, a defendant who obtained an assignment and transportation of coal cars contrary to the I.C.C. priority order was held to have violated the Elkins Act. In view of the circumstances and cases mentioned above, the I.C.C. regulations were material and the proper subject of instructions to the jury. It should also be noted that these regulations were already before the jury as parts of Exhibits 32 and 32A, the latter of which was received without objection by appellant.

Appellant further objects (Appellant's Op. Br. pp. 32-33) that "Nowhere does the Court or the Government explain how 'they (the regulations) do relate to matters involved in this case' . . . "However, in its opening statement the Government explained the relevance of the I.C.C. regulations [R.T. 29] and continued to do so throughout the trial. [R.T. 40-41, 426, 486]. The Court instructed the jury that appellant was "not being prosecuted for violation of the Interstate Commerce Act or of the regulations under that Act; however, they do relate to the matters involved in this case . . ." [R.T. 501] as was obvious from the testimony of Mr. Sumner. [R.T. 43-44.]

Appellant's contention that the jury used the I.C.C. regulations as the basis for convicting appellant is clearly without merit since it is based solely on the jury's request during its deliberations. "May we have the indictment and the date of filing suit in Superior Court, S.P. v. Continental Shippers." The jury merely

asked for a copy of the charges against appellant and wanted to know when Southern Pacific sued Continental Shippers civilly for freight charges due. The Government cannot see how this jury request shows that the time periods of the regulations were "used by the jury as the basis to assess the guilt of appellant" (Appellant's Op. Br. p. 33), as appellant contends.

2. The Instruction as to What Constitutes a "Concession" or "Discrimination" Was Correct. [Government's Proposed Instruction, Set 2, No. 8, C. T. 138 as Given by the Court at R. T. 506.]

The case of *Hocking Valley Ry. Co. v. United States,* 210 Fed. 735 (6th Cir. 1914), *cert. denied* 234 U.S. 757 (1914), held that the obtaining of credit for freight charges by one shipper for periods longer than those available to other shippers constitutes a concession or discrimination under the Elkins Act.

In the *Hocking* case, the shipper gave a note for its indebtedness on freight charges and agreed to pay interest thereon. In the present case, appellant obtained credit extensions without the detriment of paying interest, and the discrimination and concession involved is consequently greater. The first 24 Counts against appellant involve benefits which virtually amount to one hundred percent pre-obtained rebates, inasmuch as appellant shipped its goods and had not paid for the shipments up to the time of trial almost one year later. Appellant's only objection to the above instruction is that there was no evidence of extension of credit to support it. [R.T. 268-269.] Appellee's Statement of Facts adequately answers this contention.

3. **The Court's Instruction on Intent Was Correct. [Government's Proposed Instruction, Set 2, No. 9, C. T. 130, as Modified and Given by the Court at R. T. 506-507.]**

Boone v. United States, 109 F.2d 560 (6th Cir. 1940);

United States v. General Motors Corp., 226 F. 2d 745 (3d Cir. 1955).

4. **The Court's Instruction With Respect to Knowledge of or Collusion by the Carrier Was Correct. [Government's Proposed Instruction, Set 1, No. 7, C. T. 88, as Given by the Court at R. T. 507.]**

The classic refutation of appellant's assertion that a carrier and shipper must knowingly act in concert in order to violate the Elkins Act is found in *United States v. Koenig Coal Co.,* 270 U.S. 512 (1926). That case involved an I.C.C. order allocating railroad coal cars. By deceit, the defendant shipper obtained more than its share of such cars *without* the knowledge of the railroad carrier. A lower court decision that an Elkins Act violation "cannot be committed without the guilty knowledge and collusion of both the shipper and the carrier," was reversed by the Court which held that "the act is plainly not confined to joint crimes."

5. **The Court Correctly Instructed on the Law of Agency. [Government's Proposed Instruction, Set 2, No. 12, C. T. 142, as Given by the Court at R. T. 507.]**

Government's Proposed Instruction No. 8 reads as follows:

> "A corporation is criminally responsible for acts committed by its agents, provided such acts were committed within the scope of the agents' authority or in the course of the agents' employment.

"The composite knowledge of a corporation's officers, agents, and employees, is attributable to the corporation for the purpose of determining criminal responsibility under the Elkins Act."

Counsel for appellant made the following objections:

"I am going to object to that unless that is coupled with instructions on knowledge in this particular case, your Honor, and made clear that it is so coupled with the element of knowledge. [R.T. 276]

* * * * *

"In one part the Government says knowledge isn't necessary, and here it is. Knowledge of what? That is the point. Knowledge of intention to violate the Act, knowledge that the Act is being violated? Knowledge of willfulness? I mean—" [R.T. 277.]

"That is the point, if the Court please. What I am trying to say is the fact that this is susceptible of being the knowledge of the corporate officers of an act of an agent. That is, such as going through a red light, which is the violation, is doing the act itself, regardless of the intent. [R.T. 277].

"The position of the defendant is that unless this instruction is knowledge of the corporation's officers, in line with the willfulness and intent to violate the statute—" [R.T. 278.]

"The Court: This doesn't say that, though.

Mr. Stevens: I know it doesn't. That is my objection.

The Court: Well, I know, but you can't include in it something that it doesn't say.

Mr. Stevens: The question, as I understand the court, is do I object to this instruction as it is, and I do.

The Court: What is your ground of objection?

Mr. Stevens: The failure that it isn't complete.

The Court: In what regard?

Mr. Stevens: In the regard it doesn't spell out the element of knowledge as embodying willfulness." [R.T. 278.]

Appellant's entire objection seems to be that the above instruction did not deal completely with the element of knowledge. However, as the Court noted [R.T. 277], this is a general instruction on agency. The Court gave full instructions on knowledge as follows:

"An act or failure to act is done knowingly and not because of mistake or inadvertance or other innocent reason. [R.T. 504]

"Now, three essential elements are required to be proved in order to establish the offense charged in the information: FIRST: * * * SECOND: * * * THIRD: Knowledge of the defendant that it was obtaining such a concession or discrimination." [R.T. 504-505.]

"The penalty of the Elkins Act is not imposed for unwitting failure to comply with the statute, but for intentionally, knowingly, or voluntarily disregarding the provisions of the Act . . ." [R.T. 506.]

"You are instructed that the defendant is charged with unlawfully and knowingly violating the provisions of Section 1 of the Elkins Act, of which I have read the pertinent portions to you.

I instruct you that this means that the defendant knowingly did the act or acts set forth in the information. [R.T. 507-508]

"The word 'knowingly' was inserted in the law by Congress for the definite purpose of excluding unintentional, accidental or unwitting acts from its purview. [R.T. 508]

"Therefore, if you entertain a reasonable doubt that any act or omission on the part of the defendant in regard to whether it was knowingly done or was done unwittingly or accidentally or unintentionally, you must render a verdict of not guilty." [R.T. 508.]

"You will note that the acts charged in the Information are alleged to have been done 'knowingly.' The purpose of adding the word 'knowingly' was to insure that no one would be convicted for an act done because of mistake or inadvertenance or other innocent reason." [R.T. 508.]

In view of the full and complete instructions given by the Court with respect to the element of knowledge, appellant's specification of error concerning the above instruction is without merit.

6. The Court Correctly Instructed With Respect to Discrimination and "Unjust" Discrimination. [Government's Proposed Instruction, Set 2, No. 6, C. T. 136, as Modified by the Court and Given at R. T. 504.]

The Interstate Commerce Act, 49 U.S.C. §3(2) prohibited carriers from releasing freight to shippers until freight charges were paid, but authorized the Interstate Commerce Commission to make exceptions to this rule for the purpose of governing the settlement of such charges and to prevent unjust discrimination.

The I.C.C., acting under this authority, apparently recognized that shippers with offices at the point of delivery could more easily and quickly obtain release of their freight by paying the charges, than could shippers with distant offices to which freight bills must be sent and from which payment checks must be received before release of freight could be obtained. Apparently to eliminate this inequality, and to facilitate the release of railroad equipment and station facilities, the I.C.C. promulgated Ex Parte order 73, under which freight could be released immediately to the shipper who then had 120 hours—a reasonable mail transaction time—in which to pay the freight charges. In short, Congress authorized the I.C.C. to make exceptions to the statutory rule when necessary to prevent unjust discrimination which would otherwise result; and the I.C.C. did so.

Appellant now insists that the term "unjust discrimination", as used by the Interstate Commerce Act in giving the I.C.C. rule making authority, be carried over into the Elkins Act and applied to inequalities in treatment obtained by shippers. In fact, the Elkins Act prohibits "discrimination" without regard to whether it is "unjust," and the Court was correct in so instructing the jury.

7. The Court Was Correct in Refusing Appellant's Proposed Instruction No. 19. [C. T. 111; R. T. 288-291.]

Appellant requested that the above instructions be given so it could argue that its acquittal in the previous case entitled appellant to think that the credit extensions charged in the present case were lawful. As the Court noted [R.T. 289-290], this argument is fallacious since the offenses in the previous *and* present

cases *all* occurred *before* appellant was acquitted in the previous case. Therefore, in no sense could appellant's violations in the present case be said to result from reliance on the Court's decision in the first case. Furthermore, good faith is not a defense to a prosecution for violation of the Elkins Act. *Central R. Co. of New Jersey v. United States,* 229 Fed. 501 (3d Cir. 1915); *cert. denied* 241 U.S. 658 (1915).

8. The Court Was Correct in Refusing Appellant's Proposed Instruction No. 23. [C. T. 115; R. T. 297-299.]

At no time did appellant object to the Court's failure to define the word "accept" [R.T. 513]; therefore, the point cannot be raised on appeal. *Federal Rules of Criminal Procedure,* Rules 30 and 51. Further, the instruction proposed by appellant would limit the meaning of the words "accept" and "receive" to definitions used in contract law and would require concert of action between a carrier and shipper before the Elkins Act is violated, contrary to the law enunciated in *United States v. Koenig Coal Co.,* 270 U.S. 512 (1926). Also, the Court's instruction that "[t]he words used in the Information and in the Elkins Act and in the Interstate Commerce Act and the Regulations are to be given their ordinary meaning as derived from everyday usage, and they are not to be restricted to any one particular or technical meaning" [R.T. 506] was an adequate instruction on the meaning of the statutory terms involved.

9. The Court Correctly Refused Appellant's Proposed Instruction No. 26. [C. T. 118; R. T. 513.]

At no time did appellant object to the Court's refusal to give the above instruction [R.T. 513]; therefore, the matter cannot be raised as error on appeal.

Federal Rules of Criminal Procedure, Rules 30 and 51. Furthermore, the Court had already adequately instructed the jury as to the three essential elements of the offense [R.T. 505], and was not thereafter required to pick out a single item of proof and tell the jury that that item alone was insufficient for conviction. Appellant was merely seeking the Court's assistance in its effort to becloud the other issues in the case and to convince the jury that the sole issue was whether or not the failure to pay bills on time constituted a crime.

VI.
CONCLUSION.

For the reasons stated above, the judgment of the District Court should be affirmed.

Respectfully submitted,

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United States Attorney,

THOMAS R. SHERIDAN,
Assistant U. S. Attorney,
Chief, Criminal Section,

DAVID R. NISSEN,
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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DAVID R. NISSEN

No. 18672

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CONTINENTAL SHIPPERS ASSOCIATION, INC.,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

PETITION FOR REHEARING.

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No. 18672

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CONTINENTAL SHIPPERS ASSOCIATION, INC.,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

PETITION FOR REHEARING.

Pursuant to Rule 23 of this Court, appellee herein respectfully petitions this Court for rehearing in the above-captioned cause.

Oral argument in this matter was heard on December 2, 1963, before Circuit Judges Richard H. Chambers, Stanley N. Barnes, and William E. Orr. The opinion and decision of this Court was filed on February 25, 1964, and this petition is filed herewith within the time provided therefor by provision of Rule 23 of this Court.

Grounds for Granting a Rehearing.

1. Effect of This Court's Decision.

The Court's previous decision is not an insignificant one which pertains only to the case at hand. It will affect a nation-wide law enforcement program of the Interstate Commerce Commission.

2. The Statute Involved Was Improperly Construed.

The Court applied a hyper-techical and unduly strict construction of the Elkins Act which was intended to be broadly interpreted, and is not subject to the general rule that criminal statutes are to be strictly construed.

Union Pacific Railroad Co. v. United States, 313 U. S. 450, 461-462 (1941);

United States v. Koenig Coal Co., 270 U. S. 512, 519 (1926);

United States v. Union Stock Yards, 226 U. S. 286, 307, 309 (1912);

Louisville and Nashville v. Mottley, 219 U. S. 247 (1911).

3. The Statute Involved Was Misapplied to the Evidence.

The Court incorrectly held that no violation of the Elkins Act occurred when appellant "took" advantages not available to other shippers because they could not be "accepted or received" unless they were "given" by the railroad.

United States v. Koenig Coal Co., 270 U. S. 512 (1926).

The Court further erred in holding that the obtaining of credit for freight charges by appellant, for periods longer than those available to other shippers does not constitute a concession or discrimination under the Elkins Act.

Hocking Valley Railway Co. v. United States, 210 Fed. 735 (6th Cir. 1914), cert. denied 234 U. S. 757 (1914).

4. The Court Ignored or Misconstrued the Evidence.

The Court incorrectly distinguished the present case from the *Koenig* case, *supra,* with the statement that in *Koenig* "the defendant had made a misrepresentation to a railroad which resulted in defendant's receiving" something not available to others. The evidence in the present case showed that appellant also made misrepresentations to a railroad to the effect that it would pay its freight charges on time, that it was able to pay on time, and that in specific instances it was then making payments which were not in fact made. These misrepresentations also resulted in appellant's receiving something not available to other shippers.

The Court incorrectly found that appellant did not solicit the credit extensions it "took" because appellant did not "request" for a particular shipment more time to pay than was available to other shippers. The Court apparently ignored the evidence that credit is not extended with respect to particular shipments, but that shippers are placed in a credit *status* which applies to all shipments. Appellant's acts of solicitation were pointed toward obtaining and retaining credit *status,* and included: (1) agreeing to abide by Interstate Commerce Commission credit regulations if credit were given to appellant; (2) shipping with knowledge that appellant might not be able to pay its bills on time; (3) threatening to take its business away from the railroad if appellant's credit was suspended for failure to pay on time, or if appellant were given any further trouble on the matter of credit; (4) asking the railroad to be

"understanding" about appellant's lateness in paying freight charges; (5) falsely advising the railroad that delinquent payments were being mailed that day, when payments were never mailed—thus inducing the railroad not to remove appellant from its credit status and enabling appellant to ship more goods on credit for which appellant never paid; (6) advising the railroad that appellant's bank balance was larger than it really was; and (7) asking the railroad for more time to pay delinquent freight charges which the railroad was trying to collect.

The Court made an irrelevant and erroneous distinction between acts of solicitation occurring before a *shipment* and those occurring afterwards. The evidence showed that shippers were all treated alike in being required to pay their bills within five days after the freight bills are presented to them. The date of such presentation is always subsequent to the date of shipment. The date of shipment is in no way relevant to the case since any possible discrimination must occur at the end of the allowed credit period, not the time of shipment. The evidence showed that when shippers do not pay within the required credit period, their credit status is suspended and all future shipments are required to be paid for before the railroad releases the goods to the shipper. When the railroad inquired about appellant's delinquent freight bills [Ex. 45] and was told by appellant that it was airmailing a check to cover the delinquent bills that day [Ex. 45, p. 2], appellant misrepresented the facts to the railroad and by deceit

induced the railroad to release goods appellant had shipped, thus preventing the railroad from retaining the goods until payment was made and enabling appellant to take more time to pay than was available to other shippers.

Respectfully submitted,

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United States Attorney,

THOMAS R. SHERIDAN,
Assistant United States Attorney,
Chief, Criminal Section,

DAVID R. NISSEN,
Assistant United States Attorney,

Attorneys for Appellee United States of America.

Certificate of Counsel.

I certify, that in my judgment, this petition for rehearing is well founded, and that it is not interposed for delay.

DAVID R. NISSEN

No. 18673

In the

United States Court of Appeals

For the Ninth Circuit

AMERICAN PRESIDENT LINES, LTD.,
Appellant,

vs.

MILDRED LUNDSTROM,
Appellee.

BRIEF OF APPELLEE

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JURISDICTION

Appellee agrees with the jurisdictional statement in Appellant's brief.

STATEMENT OF THE CASE

In June of 1961, Mrs. Lundstrom, the appellee, was recuperating from a broken hip and had visited her son in Japan for a month. She traveled to Japan by air, but chose to return by appellant's steamship, the PRESIDENT HOOVER, in an attempt to advance her recuperation and obtain more relaxation (Tr 20). It is agreed that she was a paying passenger at the time of her injury (Tr 6-7, R2).

The pertinent evidence in this case can be grouped into three categories:

(1) Appellee had severe physical handicaps at the time she boarded appellant's ship.

Mrs. Lundstrom is a 59-year-old women who was severely handicapped prior to the accident in question by two separate conditions, first, an arthritic condition that left disabled a great many joints in her body. It had afflicted both arms and hands, rendering them, in the words of the trial judge, "more or less like claws, so that the jury could well believe that her hands were to

a greater or lesser extent useless to her . . ." (Tr 24-26, 132). She was unable to straighten her left arm (Tr 26), could only touch handrails, and could not hold them with a secure grip (Tr 16-17), and, in fact, was unable to grasp or properly hold crutches because of this claw-like condition of her hands (Tr 28). Her fingers were so useless to her that she was even unable to open the drawers in her cabin to place her clothes (Tr 38). In addition, her toes were stiff, like her fingers, and caused pain with every step (Tr 31-32).

The second prior disabling condition was a hip fracture, suffered in 1960, requiring her to be hospitalized for 149 days (Tr 10, 20, 28). This injury left her with a pronounced limp (Tr 16, 30) and forced her to negotiate stairs by advancing her right foot and then bringing her left foot even with it, proceeding in this slow and clumsy fashion, step by step (Tr 30-31, 36).

(2) Responsible officers aboard appellant's ship were given actual notice of appellee's physical handicap.

At the time Mrs. Lundstrom boarded the PRESIDENT HOOVER in Yokohama, the ship's personnel was completely apprised of her disabilities, handicaps, limitations and general condition. Mrs. Lundstrom's son spoke specifically with the ship's purser, whom he could identify by name (Tr 9), the assistant purser (Tr 9)

and the chief steward, also identified by name (Tr 12-13). These officers were informed generally about her arthritic condition in her hands and her feet and that she was quite handicapped. They were also informed of the fracture in her right hip (Tr 10). Specifically, they were told that "It is very unstable for her to get around, as far as *climbing stairs* or even walking in general." (Tr 10) (Emphasis ours). Appellee's son further informed the officers specifically that his mother was handicapped in getting dressed, handling her clothing, trying to go to the bathroom, and getting out of chairs (Tr 10-12).

Mrs. Lundstrom, herself, told the "ticket taker" on boarding that she had been recuperating from a broken hip and needed assistance in dressing for dinner (Tr 33-34). Slightly later, on the same day, she told the ship's nurse she had difficulty *in going up and down stairs* (Tr 52).

As a result of these discussions, and thus the notice given to appellant, Mrs. Lundstrom's son was assurred by the purser that he, the purser, would take care of Mrs. Lundstrom, that this was his job, and that everything would be all right (Tr 11). The steward also assurred Mrs. Lundstrom's son that everything within his power to help appellee would be done (Tr 13). In fact, subsequently, a stewardess was furnished by the

ship who helped Mrs. Lundstrom dress, and a room steward was called to open her dresser drawers (Tr 36-38). After meals, a steward would assist Mrs. Lundstrom in arising from her chair (Tr 36).

(3) Appellant took no action to protect appellee from injury during a fire and boat drill, despite its knowledge of her disabled condition.

In the early morning of July 16, 1961, the ship sailed from Yokohama (Tr 37-38). On Monday, July 17, 1961, Mrs. Lundstrom received a copy of the ship's newspaper, "Presslines", which contained a notice of a fire and boat drill to be held that day. This was the first and only information Mrs. Lundstrom received concerning such a drill (Tr 39). No one told her that she need not attend (Tr 40), or even that she need not attend if not in physical condition to do so (Tr 41); no one showed her how to get into her life jacket (Tr 41); in fact, no person on the ship told her *anything* about the drill (Tr 41). So, the only information Mrs. Lundstrom received was the command in the notice that "all passengers are required to attend these drills, wearing their life jackets * * *" (Tr 40-41).

Mrs. Lundstrom heard the alarm bell and attempted to put on her jacket, but could not properly fasten it because of her crippled fingers. To some extent, she was helped in this by another passenger (Tr 42-44).

In attempting to climb the stairs, she had difficulty seeing the floor over the protruding life jacket (Tr 45-46, 48). The excitement and the rush occasioned by the fire drill, as Mrs. Lundstrom attempted to negotiate the stairs, can best be described in her own words, "When we got to the stairway, I had ahold of the railing, and I kept as close to the railing as I could, and went up the steps one at a time. Mrs. Wells was right behind me, and all these other people kept rushing by and saying "Excuse me," and I got so nervous and I was trying to hurry so fast so I wouldn't be late because I knew that I was pokey. And that was when I got to the top, and I knew that — I thought I was on that top step. Instead of that, I just * * *" (Tr 46-7). As she progressed up the stairs no one told her where to go (Tr 47). Even though there were about thirty people milling around at the top of the stairs, there was no ship's officer present to tell them what to do (Tr 47).

When appellee fell, she was removed to her stateroom and then attended by the ship's doctor and nurse until the vessel reached Hawaii. During this time, she suffered great pain, inconvenience and humiliation, and, without dispute, her injuries were of a very serious and permanent character (Tr 67-69, 74, 61-64).

The case was tried to a jury which returned a verdict for the appellee. Appellant's motion for a directed ver-

dict and for judgment n.o.v. were both denied, and such denial is the subject of this appeal (R 8-13).

ARGUMENT

In view of the jury verdict for appellee, the evidence must be examined in a light most favorable to her. There was substantial evidence to show that Mrs. Lundstrom was disabled; that the ship had actual knowledge of such disability; that the ship did not exercise the high degree of care required by law, when it failed to excuse her from the fire drill or protect and assist her if she was to participate in the fire drill. As a result, she fell and received permanent injuries.

APPELLEE'S ANSWER TO POINT ONE

There was substantial, uncontradicted, evidence that Mrs. Lundstrom was disabled. Our statement of facts has set forth in detail the extent of this disability, which was established by the jury verdict. In addition to the oral testimony, the jury had the opportunity to see Mrs. Lundstrom's hands, watch her walk, observe the manner in which she was able to hang onto a railing (Tr 49) and climb up and down steps into the witness box. The appellant called no witnesses to contradict her as to any part of her testimony or to challenge her doctor's opinion. This lack of contradiction was also undoubtedly weighed by the jury.

Appellant asserts that she was "taking part in the ship's activities for two whole days without any difficulty and without any hint or suggestion that she could not participate in the drill * * *" (Br 11); emphasizes her ability to get up and down stairs (Br 3), and, in general, attempts to create the impression that Mrs. Lundstrom flitted about the vessel like a high-spirited college girl. There is no evidence to support such statements, such as she "partook freely of the ship's activities for two full days * * * using all the stairways" (Br 10), and had been "moving about the ship freely and with no trouble at all * * *" (Br 3), but even if there were, the jury would still be permitted to find that Mrs. Lundstrom suffered from a severe disability.

The only stairway used by Mrs. Lundstrom was that going to and from the dining room and one one occasion, that leading to the ship's library (Tr 86). While using these stairs, she was not required to wear a life jacket; people were not rushing by her; there were not thirty people milling about at the top of the stairway, and there was no bell clanging driving her forward at the fastest possible pace (Tr 107-108). Certainly, if appellant furnished assistance to her to get dressed and even to open her bureau drawers, this, along with the actual notice of her general condition, would constitute more than a "hint or suggestion that she could not

participate in the drill" (Br 11). Her physical handicap cannot be denied.

It is admitted by appellant (Br 11) and it is the uniform law, that the ship-owner owes a high degree of care to every passenger for hire, whether physically disabled or not. This Court has held that such a carrier owes a duty of exercising "extraordinary vigilance and the highest skill to secure the safe conveyance of the passengers," *Allen v. Matson Navigation Co.*, 255 F2d 273 (CA 9, 1958), at 277. When a physical disability of a passenger is known to the carrier, it must exercise a higher degree of care for the safety of that person as the infirmity requires. On this latter proposition, there seems to be a paucity of cases in the maritime field. However, there are numerous cases involving landside carriers, who have the same duty to their passengers as have ships toward theirs. As stated in Gilmore and Black, The Law of Admiralty, page 22,

> "The subject of liability to passengers for injury may be summarily handled here, as the principles involved differ little from those in use ashore. * * *"

The landmark case is *Croom v. Chicago, M. & St. P. Ry. Co.*, 52 Minn. 296, 53 NW 1128 (1893). There, the defendant carrier accepted an eighty-year-old feeble and infirm person as a passenger. He required special care. It was necessary for him to change cars at 4 A.M.,

but no one assisted him in making this change. While carrying his own luggage, he was the last to get off the first car and had to go up steps to board the second car. He negotiated the steps to the loading platform, but fell off the other side near another track. The court, in that case, laid down the rule that has been frequently followed by other courts, when it said:

> "If a passenger, because of extreme youth or old age, or any mental or physical infirmities, is unable to take care of himself, he ought to be provided with an attendant to take care of him. But if the company voluntarily accepts a person as a passenger, without an attendant, whose inability to care for himself is apparent or made known to its servants, and renders special care and assistance necessary, the company is negligent if such assistance is not afforded. In such case it must exercise the degree of care commensurate with the responsibility which it has thus voluntarily assumed, and that care must be such as is reasonably necessary to insure the safety of the passenger, in view of his mental and physical condition. This is a duty required by law as well as the dictates of humanity."

A recent case from California, *McBride v. Atchison, Topeka & Santa Fe Railway Co.*, 44 Cal 2d 113, 279 P2d 966, (1955) quotes with approval the above language from the *Croom* case. Plaintiff was using crutches because of a previous knee operation and fell on a cigar butt when alighting from defendant's coach. A judgment of nonsuit was reversed. The court held that the

carrier, when it knows a passenger to be abnormal, either physically or mentally, is bound to give such higher degree of care for his safety as his infirmity requires, and the failure to do so is negligence.

Turner v. Wabash Ry. Co. (Missouri, 1919), 211 SW 101, involved a seventy-two-year-old passenger paralyzed on the left side, so that he had no control over the use of his left leg and could see only straight ahead with his left eye. He was compelled to walk with a cane and had been assisted up the steps of the train car when boarding by some of defendant's employees. When plaintiff attempted to depart, he handed his baggage out of the car window to another person not connected with the defendant and then waited for someone to come and help him from the car. No one came, and plaintiff eventually decided to attempt to depart by himself. In trying to alight, he fell and broke his hip. A verdict for the plaintiff was sustained by the appellate court. The factual situation of this case is very similar to the case at bar.

In *Holmes v. Atlantic Coast Line R. Co.*, 181 NC 497, 106 SE 567 (1921), plaintiff was old and feeble and required assistance in alighting at least, her son had so notified the conductor, just as did Mrs. Lundstrom's son notify the ship's personnel. The conductor refused to assist her and stood by watching while she slid down

the steps to the ground. Because of this manner of departure, plaintiff was injured, brought suit and was allowed compensatory as well as punitive damages. This was affirmed by the appellate court.

Talbert v. Charleston & W. C. Ry. Co., 75 SC 136, 55 SE 138 (1906), involved a passenger who had only one hand. He purchased a ticket from the conductor, who testified he did not notice the plaintiff's infirmity. Plaintiff was injured and thrown to the ground while attempting to board defendant's train. In affirming the verdict for the plaintiff, the court held that not only the duty of exercising a high degree of care had been violated, but the conductor also had a duty to notice, and not disregard, the condition of the plaintiff.

There has been a somewhat similar case in the State of Oregon, *Watts v. Spokane, Portland & Seattle Ry. Co.*, 88 Or 192, 171 P 901. The plaintiff in this case was seventy-four years of age and was riding the defendant's train from Rainier to Goble. He was infirm and weak, which was or should have been obvious and visible to the defendant. When the train stopped, defendant's employee assisted a woman with a baby in alighting and then threw the stool up on the platform and signalled the train to go ahead. In attempting to

depart by himself, plaintiff fell, although it is not clear exactly why. A verdict against the railroad was sustained, although that against the conductor was reversed. The court held the rule to be:

> "The rule with respect to the duty owing persons of advanced age or under disability is that they should be given such assistance as their appearance reasonably indicates is necessary; and the train employee is bound to consider only such facts with respect to the passenger's condition as are within his knowledge, or are made known to him through the passenger's appearance, or otherwise."

Such law seems best summarized in the case of *Southern Pacific Co. v. Buntin*, 54 Ariz 180, 94 P2d 639, 124 ALR 1422 (1939).

> "If the carrier knows the passenger to be abnormal, either physically or mentally, it is then bound to give such higher degree of care for the safety of that person as his infirmity requires, and the failure to do so is negligence, even if the conduct of the carrier would not be negligence toward the normal person."

We think the defendant was guilty of ordinary negligence here — failure to do what a reasonable person would do under the circumstances. Certainly, it was

guilty of failing to exercise the high care required of a common carrier, particularly with the knowledge of this person's physical disability. Is it making an "insurer" of appellant to ask that the ship's officers notify passengers with physical impairments that they need not attend the fire drill, that they should remain in their cabin? Is it too much to ask the ship's officers to furnish an escort for a known disabled person, and to tell such person she need not wear a life jacket while manipulating her way up the steps through the rushing crowd, or even merely to warn such person of what a fire and boat drill entails so that she could intelligently decide whether she should, or could, attend? If the ship were sinking, would not the officers be required to send special assistance to one like Mrs. Lundstrom to see that she reached a life boat in safety?

Further decisions on a related subject can be found in 17 ALR2d 1085. This annotation discusses the duty and liability of a carrier to an intoxicated person. Without unduly lengthening this brief, we can safely say it is universally held that intoxication is a disability, and the carrier must exercise the degree of care necessary rotect such a known intoxicated person. Certainly, person under intoxication should get no greater pro-

tection from our courts than would a person who had been previously crippled, as had Mrs. Lundstrom.

Appellant makes much of the claim that the fire drill itself, the life jacket and other conditions aboard the ship were in conformity with Coast Guard regulations (Br 6-7-8). We think this is completely immaterial. In the first place, we do not claim that Mrs. Lundstrom was injured because appellant neglected to follow Coast Guard regulations. Plaintiff's exhibit 7 reads as follows:

> "Section 78.17.50 (b) (5) says:
>
> " 'The passengers shall be *encouraged* to fully participate in these drills and shall be instructed in the use of the life preservers.' " (Emphasis ours)

Thus, between the ship and the Coast Guard, passengers are not *required* to participate, but are only encouraged. This, of course, is only common sense. If a passenger had a serious cardiac condition which would be adversely affected by climbing stairs, we know that he would be properly excused from participating.

However, the only notice to Mrs. Lundstrom was contained in the daily newspaper, stating that she was

"required" to attend these drills (Pl Ex 3, Tr 39-40). The word very plainly meant to her, as it meant to the jury, that she was obliged to attend the drill. On page eight of appellant's brief it is admitted that a passenger with a reason could be excused. In the exercise of the highest degree of care, the appellant was obliged to so inform Mrs. Lundstrom.

Thus, the court was correct in submitting to the jury the question of whether the American President Line exercised this high degree of care required by law when it (1) failed to advise a person whom it knew to be disabled of the activities of a fire drill, (2) failed to advise such person that she need not don a life jacket, (3) failed to provide assistance to such disabled person in going up steps in the excitement of a drill when other people were rushing past and thirty more people were milling about at the head of the steps, and (4) failed to advise such person that she could be excused from the drill.

APPELLEE'S ANSWER TO POINT TWO

Appellant claims that because of some answers given on cross-examination by appellee, to the effect that she fell because she could not see over the life jacket to the top step, the ship should be excused from

liability. Appellant asserts that the ship's officers had no notice of such inability and that therefore it should not be responsible. This contention is erroneous for four reasons.

First, appellant had specific notice of Mrs. Lundstrom's inability to safely move and climb steps (Tr 10, 52). Moreover, the jury observed her impaired movements while encased in a life jacket, and it could determine that she could not see over the life jacket. Appellant knew, or in the exercise of even due care should have known, that Mrs. Lundstrom's physical condition, her size, and the size of the life jacket made it unsafe for her to attempt to navigate a crowded stairway during a fire drill.

Second, appellee's testimony that she was unable to see the top step was not confined only to the wearing of the life jacket. The hazard to her involved not only the life jacket, but also her being required to go up the stairs one at a time, with the left foot always preceding the right, people rushing by her on the stairway and her natural reaction to hurry, and about thirty people milling about at the top of the stair.

Third, appellant is further in error when it asserts that Mrs. Lundstrom's testimony amounts to a binding admission against interest as to the legal cause of the

injury. The trial court held that her comments were, at most, expressions of opinion and not statements of fact (Tr 132-4). It has been held that such opinions by a non-expert as to the "cause" of an event invades the province of the jury as the triers of fact, and are therefore inadmissable. Hence they cannot be binding. At the very most, Mrs. Lundstrom's remarks—partial answers given on cross examination—could be viewed by the jury in the light of all the other testimony of appellant's negligence. *Mikulich v. Carner*, 69 Nev 50, 240 P2d 873, 38 ALR2d 1 (1952); Annotations in 38 ALR2d 13 and 169 ALR 803-813; 20 Am Jur., 1963 Supp 204, Evidence, sec. 1181; *Reynolds v. Sullivan*, 330 Mass 549, 116 NE2d 128 (1953).

Fourth, the logical weakness of appellant's argument should be apparent. Mrs. Lundstrom has charged the ship with negligence in failing to take adequate care of her and to protect her during the fire and boat drill. The jury found this to be true, but there must have been an immediate cause of the injury. If Mrs. Lundstrom had not tripped, she might have been knocked down by another passenger rushing by on the stairway, or she might have been injured in some other manner. Yet the underlying legal cause of her injury would still be the failure of the ship to protect her, as claimed in her contentions. Appellant would try to cast the case in

the same light as a conventional "slip and fall" claim but this is not the theory of appellee. Therefore, argument that the life jacket, stairway or handrail were in good repair is wholly beside the point.

Appellant also contends in passing that Mrs. Lundstrom was able to, and did, use her hands to grip the rail of the stairway (Br 15-16). There is ample evidence hereinabove cited that she had practically no function of her hands. She could not even pull open dresser bureau drawers and had to have the room steward's assistance for this simple act. So when Mrs. Lundstrom testified that she hung onto the rail, the jury having seen her and heard all of the other testimony could assess how tight a grip she could achieve. Further the jury might well have taken into account appellant's own contention in the pre-trial order (R 4) that Mrs. Lundstrom was "negligent" in not "holding firmly to the hand rail."

Like appellant's first point, these issues are all questions of fact which were vigorously argued and submitted to the jury under eminently fair instructions to which appellant took no exception.

CONCLUSION

In our system of trial by jury, it is up to the jury to determine whether specific conduct, or lack of it, con

stitutes a breach of the required standard of care, as well as to decide issues of fact. Here appellant tried its case without calling so much as a single witness. The issues were put to the jury by an experienced and fair judge under instructions so obviously correct that even appellant had no exception. As we have shown, there was ample evidence to support each element of appellee's case: disability, notice, failure to extend protection and resulting injury. The judgment should be affirmed.

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I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for The Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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of Attorneys for Appellee

No. 18673

United States
COURT OF APPEALS
for the Ninth Circuit

AMERICAN PRESIDENT LINES, LTD.,
Appellant,

vs.

MILDRED LUNDSTROM,
Appellee.

Appeal from the United States District Court for the District of Oregon.

BRIEF OF APPELLANT

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INDEX OF AUTHORITIES

No. 18673

United States
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BRIEF OF APPELLANT

JURISDICTION

As appears from the Pretrial Order (R. 1), this was an action commenced in the Oregon Circuit Court by Plaintiff, Mildred Lundstrom, a steamship passenger, against the defendant steamship owner, for personal injuries, and was removed to the United States District Court of Oregon for diversity of citizenship. From a judgment for plaintiff, defendant has appealed, R. 15.

Jurisdiction of the District Court rested on 28 U.S. C.A. Sections 1332 and 1441. Jurisdiction of this Appellate Court rests on 28 U.S.C.A. Sec. 1291.

STATEMENT OF THE CASE

The appellee, Mildred Lundstrom, afflicted with arthritis, and having broken her right hip sometime previously in a fall, was advised by her doctor, in The Dalles, Oregon, to take a trip to visit her son in the Air Force at the Tokyo Air Base in Japan. The object of the trip was to enable Mrs. Lundstrom to recuperate and relax and move around and "use the hip" and "depend on myself". Tr. 10, 20, 31, 59-60. She flew over to Japan, but planned to return by steamer, as giving her more opportunity to recuperate and relax. Tr. 20. She accordingly boarded the PRESIDENT HOOVER as a firstclass passenger at Yokohama on July 15, 1961, for the voyage home. Tr. 6, 83. Her son accompanied her to the ship and told the ship's purser, and also the chief steward, about his mother's arthritic condition, and that she had broken her hip and was unstable, and he was concerned for her safety, and "if anything happened to give her all the assistance he possible could". Tr. 9-12. He was assured that this would be done.

The ship sailed shortly after noon on the 15th of July. Tr. 83. On the 17th of July, in the afternoon, while ascending the stairway from A Deck to the Promenade Deck, to attend a Fire and Boat Drill, Mrs. Lundstrom fell at the top step (Tr. 47, 94) and broke her left hip. In the meantime, from the 15th to the 17th, two full

days, she had been moving about the ship freely and with no trouble at all, and had used the ship's stairways from A Deck, where her stateroom was, to B Deck below where the dining salon was, six different times, or rather twelve times counting each descent and ascent separately. These were: Going to dinner on the evening of the 15th; to breakfast on the 16th; to lunch on the 16th, to dinner on the 16th; to breakfast on the 17th; and to luncheon on the ~~18th~~ 17th. Tr. 84-6. These were the same kind of steps and handrailing as those from A Deck to the Promenade Deck where she fell. Tr. 85-6.

She also used the three or four steps to go to the raised balcony in the dining room where her table was. Tr. 35, 84. This, of course, was every time she went to her meals. And she did it without any difficulty at all. She also used the stairs to the library, but she says they were different. Tr. 86. The stairs to the Promenade Deck, where she fell, were by no means new to her. She had used them frequently before, as evidenced by this testimony:

> "Q. How did you know which stairway to use? (to go to the Boat Drill). Did anybody tell you?
> A. We *always* went up that way to the promenade deck. (Italics supplied).
> Q. You had been up there before?
> A. Yes." Tr. 46.

When the bell rang for the Boat Drill she went to the cupboard in her stateroom, and standing "on tiptoe" pulled out the lifejacket.—not an easy feat. Tr. 41-42.

She drove her own automobile. Tr. 64. 80.

She was not an inactive person.

Fire and Boat Drills are *mandatory*,—required by Coast Guard Regulations, having the force of law. They will be referred to more at length in the Argument. The Drill was held in strict accordance with them in every particular.

The life jacket which Mrs. Lundstrom was wearing was likewise of a type required and approved by the Coast Guard, and bearing the approval stamp thereon. There was nothing wrong with it. Nor was there anything wrong with the steps or handrailing.

The Drill occurred about three o'clock in the afternoon, apparently on a calm sea, since there is no evidence otherwise, or that the ship was rolling. Mrs. Lundstrom, ascending the stairs from A Deck to the Promenade Deck, completed the ascent successfully until she reached the top step, when she fell forward and broke her left hip. She ascribes her fall to the fact that she could not see, over the bulge of the lifejacket, the steps she was ascending. Tr. 48, 94-5, 99-100, 102 and 104. She never asked to be excused from the Drill; nor did she ever ask for any assistance. Tr. 96-7.

At the close of the case defendant moved for a directed verdict because there was no evidence of negligence, and especially because, since plaintiff herself stated that the cause of her fall was her inability to see over the lifejacket, and there was no evidence whatever that this was known or should have been known to the ship's officers, this necessary element of negligence was lacking. Tr. 113-114.

The motion was denied, and the verdict was returned for $30,515.82. R. 8. Judgment thereon was entered

with costs. R. 9-10. Defendant moved to set this aside, as not supported by the evidence and for judgment n.o.v. R. 11-13.

The Trial Judge, while expressing some doubt, overruled this, and in fact invited this appeal.

From his ruling this appeal is taken.

SPECIFICATIONS OF ERROR

Specification No. 1:

The Court erred in not directing a verdict and in not setting aside the judgment that was entered on the verdict rendered and entering judgment for defendant for the reason that there was no evidence tending to show negligence on the part of the defendant in permitting Mrs. Lundstrom to take part in a routine Fire and Boat Drill under the circumstances shown in this case.

Specification No. 2:

The Court erred in not directing a verdict and in not setting aside the judgment that was entered on the verdict rendered and entering judgment for defendant for the reason that Mrs. Lundstrom expressly testified that the cause of her fall was her inability to see, over the bulge of the lifejacket she was wearing, the steps she was ascending; and there is no evidence whatever that the ship's officers, or any other agent, knew or should have known of this fact. Consequently, an essential element necessary to hold the defendant liable for negligence causing the injury was lacking.

ARGUMENT

PLAINTIFF'S CASE IS BASED ON NEGLIGENCE, AND THERE WAS NO EVIDENCE OF IT. HENCE A VERDICT SHOULD HAVE BEEN DIRECTED; THE JUDGMENT ENTERED THEREON SHOULD HAVE BEEN SET ASIDE AND A JUDGMENT N.O.V. ENTERED.

First Point

There was no negligence in permitting Mrs. Lundstrom to take part in the fire and boat drill. Her activities about the ship for the two days previous refutes it. The drill was required by law. The stairway and lifejacket were in perfect condition.

The gist of plaintiff's case is that because of her arthritic condition and the ship's knowledge of it, conveyed by her son, she should not have been permitted to take part in the Fire and Boat Drill; or, if permitted, should have been assisted.

First it may be well to look at the Coast Guard Regulations. They are mandatory.

Sec. 78.17-50(a) says:

> "The master shall be responsible for conducting fire and boat drill at least once in every week. In the case of a vessel where the duration of the voyage exceeds 1 week, a fire and boat drill shall be held before the vessel leaves port and at least once a week thereafter." Def's Ex. 7.

Sec. 78.17-50(b) says:

> "The fire and boat drill shall be conducted as if an actual emergency existed. All hands should re-

port to their respective stations and be prepared to perform the duties specified in the station bill." Def's Ex. 7.

Sec. 78.17.50(b)(5) says:

"The passengers shall be encouraged to fully participate in these drills and shall be instructed in the use of the life preservers." Pltff's Ex. 7.

They were so instructed by a printed notice and picture illustrating a person donning a lifejacket posted in each stateroom. Def's. Ex. 6.

Sec. 78.47-47 says:

"Framed notices shall be conspicuously posted in the passenger staterooms indicating the following which may be posted separately or together.
78.47-47(a)(1) Emergency Signal:

EMERGENCY SIGNALS

FIRE AND EMERGENCY—CONTINUOUS RAPID RINGING OF THE SHIP'S BELL AND OF THE GENERAL ALARM BELLS FOR A PERIOD OF NOT LESS THAN 10 SECONDS.

ABANDON SHIP (OR BOAT STATIONS)—MORE THAN 6 SHORT BLASTS AND ONE LONG BLAST OF THE WHISTLE SUPPLEMENTED BY THE SAME SIGNAL ON THE GENERAL ALARM BELLS.

THE OCCUPANTS OF THIS ROOM ARE ASSIGNED TO LIFEBOAT NO. ..... ALL PASSENGERS ARE REQUIRED TO PUT ON LIFE PRESERVERS AND GO TO THEIR LIFEBOAT STATIONS WHENEVER GENERAL ALARM BELLS RING.

THE ROOM STEWARD WILL PROVIDE LIFE PRESERVERS FOR CHILDREN AT THE START OF THE VOYAGE.

> 78.47-47(a)(2) Life Preservers. The location of life preservers together with instructions and pictures showing how they are worn shall be indicated in a framed notice."
> Def's Ex. 7.

This notice is especially relevant for the reason that "Presslines", the little newspaper published on the ship and distributed to the various staterooms on the morning of July 17th, in announcing the Fire and Boat Drill for that afternoon, said that "All passengers are required" to attend these drills, etc. Plff's Ex. 3. Tr. 39, 40. And the inference was sought to be drawn at the trial, that Mrs. Lundstrom, by this, was obliged to attend the drill. But it will be observed that the language is identical with that in the Notice prescribed by the Coast Guard itself. In short, mandatory. But certainly did not preclude any passenger, having a reason, from being excluded.

Sec. 71.25-15(a)(3) says:

> "Each life preserver or wood float shall be examined to determine its serviceability. If found to be satisfactory, it will be stamped 'Passed', together with the date, the port, and the inspector's initials. If not in a serviceable condition, the life preserver or wood float shall be removed from the vessel. If the life preserver is beyond repair, it shall be destroyed in the presence of the inspector."

The life preserver used by Mrs. Lundstrom was approved by the Coast Guard in accordance with above. Def's Ex. 8, offered by plaintiff. Tr. 42.

The question then is:

Was there any evidence to support a finding that de-

fendant was negligent in permitting Mrs. Lundstrom to attend the Drill? Or to attend without assistance?

In considering this, these facts must be borne in mind:

1. The sea was smooth. The ship was steady. We may be sure of this, for had it been otherwise, it is certain plaintiff would have testified to it. Furthermore, boat drills are not ordinarily held in rough weather.
2. It was good daylight.
3. There was not a thing wrong with the ship anywhere. The stairway and handrailing were in good condition. There is no claim otherwise.
4. The lifejacket was approved and stamped by the Coast Guard. In fact very good. There is no claim to the contrary.
5. Mrs. Lundstrom was by no means an inactive or helpless person. She drove her own automobile. Tr. 64, 80. She undertook a voyage to Japan all alone. While living with her son she ascended and descended the stairs to the second story of his quarters every day for a month. Tr. 6, 16, 20-21.
6. Much is made of the son's warnings to the ship's officers about his mother's arthritis. But neither he nor his mother, nor her doctor, wanted her to be nursed and babied and held by the hand. The whole object of the trip was "to use the hip", (Tr. 10), and for "recuperation and to relax".

Tr. 20. And her doctor testified that she was able to walk around and take care of her personal needs, and go up and down stairs slowly,, (Tr. 60); and he advised the trip so she could "get some activity, keep these joints movable". Tr. 59. But the best evidence that she did not want undue and fussy attentions is her own statement that she took the trip so she "could get clear away from everybody and have to depend on myself". Tr. 31.

And this seems to have been the son's idea too. Although he was careful to explain to the purser and the steward his mother's condition, he never asked that she be assisted up or downstairs, or discouraged from taking part in the normal activities of the other passengers. His request was rather "*if anything happened* to give her all the assistance" needed. Tr. 9. (Italics supplied).

7. Pursuant to this declared object of this sea voyage, Mrs. Lundstrom partook freely of the ship's activities for two full days, from July 15th at noon, to July 17th, at three o'clock, using all the stairways, as already shown in our Statement. This was all without a hint or suggestion of any difficulty to any of the ship's officers,—as indeed there was none.

8. There was nothing unusual about the Fire and Boat Drill. It was normal in every way, and was fully explained to the passengers, including Mrs. Lundstrom, in the ship's newspaper, "Presslines". Plff's Ex. 3, and the Stateroom Notice, Def's Ex. 6.

9. Finally, Mrs. Lundstrom never asked to be excused from the Drill, or requested assistance, but with the other passengers went right along with it.

Now the question is: Was there anything in the foregoing circumstances which should have put the ship's officers on notice that Mrs. Lundstrom should not participate in the Fire and Boat Drill?

This is not a mere question of fact. It is a question of law.

The question may be put another way: Is a shipowner whose ship and equipment are in perfect condition, who holds a routine Fire and Boat Drill, as required by law, encouraging the passengers to participate, again as required by law, liable to a passenger who, although arthritic, has been taking part in the ship's activities for two whole days without any difficulty, and without any hint or suggestion that she could not participate in the Drill, or any request to be excused?

It is true the shipowner owes a high degree of care, but also true that he can assume every passenger will exercise reasonable care to look after his own safety, and also true that the shipowner is not an insurer. Gilmore and Black, Law of Admiralty. Page 22 note.

We suggest that to hold the shipowner liable under the circumstances here would be to make him an insurer. As the Court said in *Weill* v. *Cie Gen. Transatlantic,* 113 F.2d 720,—

> "It does not seem to us that a steamship company can reasonably be held to so strict a duty of care."

In this case a jury's verdict was set aside. As was also done in *Van Nieuwenhove* v. *Cunard,* 216 F.2d 31, which see.

Second Point

Mrs. Lundstrom testified expressly that the cause of her fall was her inability to see, over the bulge of her lifejacket, the steps she was ascending. This was a statement of fact—not opinion. There is not the slightest evidence that the ship's officers knew or should have known of this. Hence this necessary element of negligence was lacking.

Mrs. Lundstrom testified not once, but several times, and without any equivocation or qualification, that the cause of her fall was that she could not see, over the bulge of her lifejacket, the stairs she was ascending, and in consequence fell at the top step because she thought she was stepping out on the deck.

Since she had successfully ascended the whole flight of stairs to the top, it is difficult to believe that she could not see; but accepting her statement as true, there is no evidence whatever that this inability to see was known or should have been known to the ship's officers. (In fact her successful ascent of the whole flight would, if they knew of it, confirm them in their belief that she could see.)

The testimony was explicit. Here it is:

"Q. In other words, you thought you had reached the top step—I mean you thought you had reached the top deck?

A. That is right.

Q. But instead of that there was one more step

and you were not on the deck?

A. One step.

Q. And you fell because you were mistaken as to that step; is that it?

A. I went to step forward and I couldn't see, and I had this life jacket on and I couldn't see and I fell.

Q. And because you had the life jacket on and couldn't see you fell?

A. That is right.

Q. Is that right?

A. That is right." Tr. 94-95.

She repeated this several times. For example:

"Q. That is what I thought. Now, you attribute your fall to the fact that you couldn't see over this bulging life jacket and see what you were doing?

A. That is right.

Q. That is why you fell?

A. Yes." Tr. 99-100.

And again she said:

"A. I couldn't see, Mr. Wood." Tr. 102

And again:

"I didn't see the step." Tr. 104.

Earlier on her direct examination she had testified to the same thing:

"Q. Were you able to see right down immediately below your feet as you went up there?

A. No, I couldn't. I couldn't see my feet from the time I got that thing on." Tr. 48

Since she herself gave this as the sole cause of her fall, and the ship's officers did not, or could not, know of it, a verdict should have been directed. But the Trial Judge held her statements to be, not a statement of fact,

but an expression of opinion, citing *Fleischman Distilling Corp.* v. *Mayer Brewing Co.,* decided by this Court February 12, 1963, 314 F.2d 149, 158-159. It is impossible for us to agree. The person who falls knows better than anyone in the world *why* she fell, and when she stated it positively as a *fact,* it seems to us it must be accepted as a *fact.*

If the *Fleischman* case is in point at all, it helps us. Fleischman's vice-president was asked—"Is it your contention, Mr. Baumgarten, that a customer would be confused in buying" between Black & White Scotch Whiskey and Black & White Beer? He said "No". This, of course, was a mere statement of his "contention". The Court, however, treated it as a denial of the existence of any confusion. It then says "Of course this is something more than a mere expression of opinion". The Court then cites the cases to the effect that mere expressions of opinion are not binding. And then avoids the whole question on another ground.

But how, it may be asked, can the witness's statement that a customer would not be confused between the two brands be "something more" than an opinion, and Mrs. Lundstrom's flat statement that she (who would know better than anyone) fell because she could not see, be a mere expression of opinion?

We have the highest respect for Judge Kilkenny, but in this he was in error.

He fell into a further error when, to justify his ruling, he said that Mrs. Lundstrom's arthritic condition made her hands more or less like claws, and a jury could well

believe that her hands were to a greater or lesser extent useless to her. This can only mean that she could not hold onto the steps' handrail. But not only is there no such claim in plaintiff's contentions in the Pretrial Order, but all of plaintiff's testimony is directly to the contrary. She said repeatedly that she held onto the handrail, and "tightly". Tr. 49-50.

Speaking of the steps to the balcony in the dining-room, she said:

> "It had a railing, and it wasn't too difficult for me to get up. I could hold something." Tr. 35.

Again, referring to the stairs where she fell:

> "A. When we got to the stairway I had a hold of the railing." Tr. 46.

Again:

> "Q. Did you have hold of that right-hand hand-rail?
> A. Yes, I did." Tr. 48.

Again:

> "A. And I really do hold on tightly when I go up and down, because I need help.
> Q. Is that the way you were holding onto the railing when you got hurt?
> A. That is right." Tr. 49-50.

Again:

> "Q. There was a railing to hang onto on these ship steps, wasn't there?
> A. And I hung onto it.
> Q. What?
> A. I hung onto it." Tr. 82.

Again:

> "A. I hung onto the railing, though, and I

watched every step I took. I had to go one at a time." Tr. 85.

Again:

"A. . . . I was holding onto the railing and trying to get up the steps." Tr. 104.

In the light of this testimony, it is impossible to believe that she could not use her hands. All of her own testimony says she could, and *did*. And she nowhere claimed that she could not.

Therefore, when Judge Kilkenny suggested that this might have been inferred by the jury, as a cause of her fall, when her own testimony denies it, and she expressly said that the cause was her inability to see, he was again in error.

CONCLUSION

The plaintiff's case must fail:

First, because for the reasons urged in Point 1, there was nothing whatever in the evidence that would put the ship's officers on notice that she should not participate in the Drill, considering her previous activities on the ship and the manner in which the Drill was held.

Secondly, it must also fail because she is bound by her admission that the cause of her fall was her inability to see over the bulge of the jacket, and there was no evidence of any kind that the ship's officers knew or should have known of this.

The kind of care required of a steamship toward a

passenger has been variously stated as "high". "very high", "utmost", etc., but really has nowhere been better stated than by this Court in *The Korea Maru,* 254 F. 398, where, at Page 399, the Court said:

> "The care required of a carrier in transporting passengers, and its consequent liability, is sufficiently stated for the present purpose under the general rule that, although the carrier does not insure that the passenger will be carried safely, still it is bound to exercise as high a degree of care, skill, and diligence in receiving a passenger, conveying him to his destination, and setting him down safely, as the means of conveyance employed and the circumstances of the case will permit."

Aquino v. *Alaska SS Co.,* 91 P.2d 1014, also states the rule on Page 1017, quoting, among other authorities, the decision of this Court in *Kitsap County Transportation Co.* v. *Harvey,* 15 F.2d 166. In that case it was held that the ship, even in the exercise of the highest care, could not anticipate that a dog tied to the ship's deck-rail might bite a passenger, and therefore was not negligent.

Probably, however, the best statement of the rule, because of its high authority, is in the opinion of the Supreme Court of the United States, in *Atchison, T. & S.R. Co.* v. *Calhoun,* 213 U.S. 1; 53 L. Ed. 671. In that case a railroad had left a baggage truck at the end of its station platform. A train was at rest, with its passenger cars some little distance from the truck. It was dark. The train started up and a bystander snatched up the plaintiff, an infant passenger, and ran alongside the train in an attempt to hand the plaintiff into the arms of his mother standing on the steps of a car. In doing

so he stumbled over the baggage truck and lost hold of the child, who fell under the car and was injured.

The Court, in reversing a judgment for the plaintiff, said:

> "It becomes necessary, therefore, to inquire whether the defendant was negligent in leaving the truck there. But, even where the highest degree of car is demanded, still the one from whom it is due is bound to guard only against those occurrences which can reasonably be anticipated by the utmost foresight. It has been well said that, 'if men went about to guard themselves against every risk to themselves or others which might, by ingenious conjecture, be conceived as possible, human affairs could not be carried on at all. The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible. He will order his precaution by the measure of what appears likely in the known course of things.' Pollock, Torts, 8th ed. 41."

The Court said:

> "We are of the opinion that the railroad was not bound to foresee and guard against such extraordinary conduct, and that its failure to do so was not negligence." 53 L. Ed P. 675.

We submit that these authorities and *Weill* v. *Cie Gen. Transatlantic,* 113 F.2d 720, and *Van Nieuwenhove* v. *Cunard,* 216 F.2d 31, already cited, amply support appellant's position, both on its First Point, that there was nothing in the evidence to put the ship's officers on notice that Mrs. Lundstrom should not participate in the drill, or that injury would result therefrom;

and on the Second Point, that there was no evidence of any kind that the ship's officers knew or should have anticipated that she could not see over the life-jacket and would thereby be injured.

A verdict should have been directed, and when it was not directed, the judgment should have been set aside and judgment n.o.v. entered for defendant.

Respectfully submitted,

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APPENDIX

Page References to Exhibits. Rule 18

Exhibits		Pages of Transcript
Plf's 3	"Presslines"	39
Def's 6	Stateroom Notice	98-99
Def's 7	Coast Guard Regulations	108-111; 116
	Note: One section of these, offered by Plf.	116
Def's 8	Life Jacket, offered by Plf.	42

No. 18674

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BERT H. NEWTON and GENEVIEVE NEWTON,
Appellants,

vs.

W YORK LIFE INSURANCE COMPANY, a corporation, MANUFACTURERS LIFE INSURANCE COMPANY, corporation, and DOMINION LIFE ASSURANCE COMPANY, a corporation,
Appellees,

E DOMINION LIFE ASSURANCE COMPANY, a corporation, MANUFACTURERS LIFE INSURANCE COMPANY, a corporation, NEW YORK LIFE INSURANCE COMPANY, a corporation,
Appellants,

vs.

D STEADMAN and WAYNE H. WENTNER,
Appellees.

OPENING BRIEF FOR APPELLANTS NEWTON.

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No. 18674

IN THE

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Appellants,

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Appellees,

THE DOMINION LIFE ASSURANCE COMPANY, a corporation, MANUFACTURERS LIFE INSURANCE COMPANY, a corporation, NEW YORK LIFE INSURANCE COMPANY, a corporation,

Appellants,

vs.

LLOYD STEADMAN and WAYNE H. WENTNER,

Appellees.

OPENING BRIEF FOR APPELLANTS NEWTON.

Jurisdiction.

Notice of appeal having been timely filed [R. 69], this Court has jurisdiction to review the decision below [R. 61] pursuant to Section 1291 of the Judicial Code (72 Stat. 348, 28 U. S. C. Sec. 1291), and the venue is properly laid in the Ninth Circuit (73 Stat. 10, 28 U.S.C. Sec. 1294, Subd. 1).

Statement of the Case.

The plaintiff-appellants Newton, husband and wife, alleging that they had suffered actual damages of $199,510.00, brought suit on November 24, 1958 in their home county of Siskiyou, California, against the three defendant life insurance companies, appellees herein [R. 50]. In April, 1958, plaintiffs discovered the falsity of the representations made in selling them a program of "bank loan insurance" [R. 31]. The claimed fraud was similar to the factual situation recently examined by this court in *Anderson v. Knox* (1961), 297 F. 2d 702, cert. den. 370 U. S. 915. See also *Steadman v. McConnell,* as Insurance Commissioner (1957), 149 Cal. App. 2d 334.

Extensive discovery proceedings lasting nearly three years followed removal of the case to the District Court of the Northern District, Northern Division. Finally, the matter came on for a trial of a separate issue of law [R. 49] raised by the separate defense that plaintiffs' action was barred for failure to bring suit within two years after appellee companies had issued their policies in 1954 and previous years. This defense was based upon the "incontestable clause" contained in each of said policies [R. 53-55] which either read:

> "This contract shall be incontestable after it has been in force during the lifetime of the Annuitant for two years from date of issue". [Manufacturers and Dominion. R. 54] or
>
> "This policy shall be incontestable after two years from the date of issue". [New York Life R. 55].

No oral evidence was introduced at the trial of this separate issue.

Two of the appellees, Manufacturers and Dominion, issued only single premium annuity contracts to the plaintiff-appellants [R. 53, 54]. The District Court made a separate conclusion of law as to these annuities, as follows [R. 58]:

> "5. The risks of loss under the single premium annuity interests are imposed primarily upon the annuitants and not upon the issuing companies and therefore the incontestable clauses contained therein are for the benefit of the issuing companies."

The District Court concluded as a matter of law that "the incontestable clauses are for the benefit of the insurers and issuing companies, as well as for the benefit of the insured and annuitants" [R. 57], and that plaintiffs' action was therefore barred against the appellee companies [R. 58, 59]. From the ensuing judgment of dismissal plus $2510.39 allowed as costs [R. 61] plaintiffs have brought this appeal.

Specification of Errors.

The District Court erred as a matter of law in the following respects:

1. In entering judgment that plaintiffs take nothing by their complaint.

2. In concluding that the two-year incontestable clauses barred plaintiffs' complaint and that said clauses were for the benefit of the insuring companies.

ARGUMENT.

I.

The History of the Original Purpose of the Incontestable Clause (to Protect the Insured) Prevents Its Being Construed as a Contractual Limitation Upon the Insured's Right to Recover After Discovery of the Insurer's Fraud.

1. History of the Incontestable Clause.

"* * * the incontestable clause was inspired by the desire of the companies to protect the honest policy holder against the possibility that his statements or innocent misstatements might operate to invalidate a claim brought at his death. The provision was justified on the grounds that such miscarriage of his plans could not, of course, after his death, have his own attention or the benefit of his own explanation and proof of his statement."

"The Life Insurance Contract," by Horne and Mansfield, 2nd ed., N.Y. 1948, p. 188.

"The clause was first used in 1864 and thereafter was voluntarily adopted generally by the insurance industry."

"The Life Insurance Policy Contract" Krueger and Waggoner, Boston, 1953, p. 57.

In Greider and Beadles, *Law and the Life Insurance Contract,* published by Richard D. Irwin, Inc. (1960) the author said at pp. 166-167:

"The incontestable clause was first introduced by life insurance companies on a voluntary basis in the latter half of the 1800's. It was introduced in an effort to counteract a growing attitude of public distrust toward the entire life insurance busi-

ness. The feeling was due largely to the practice of some companies of taking full advantage of the fact that even relatively unimportant misstatements in the application for life insurance, if they were not literally true, gave the companies at that time the legal right to disaffirm the contract. . . .

"The use of the incontestable clause was the company's pledge to the insured and beneficiary that it would not rely on such purely technical grounds to disaffirm its contracts."

The phrase "incontestable clause" has thus become a technical expression in the area of insurance. It is a term of art or insurance shorthand employed to describe the special kind of policy-holder protection that the clause was originally designed to accomplish.

This Court summarized the history of the "incontestable clause" in *Richardson v. Travelers Ins. Co.* (1949), 171 F. 2d 699, 701, 7 A. L. R. 2d 501, saying:

"It is generally agreed that the origin of the clause may be found in the competitive idea of offering to policy holders assurance that their dependents would be the recipients of a protective fund rather than a law suit (citing cases). Too often had an insurer obtained a judicial determination upon maturity of the policy that insured had made an inaccurate statement in his application, or was guilty of fraud which resulted in the avoidance of liability under the policy. The clause remedied this situation by rendering the insurer's promise to perform in accordance with the statements and terms in the policy absolute upon the passing of a spe-

cified time, expressly subject only to the non-payment of premiums. Many states have evidenced their favor toward the incontestable clause by enacting legislation requiring it in life insurance policies."

As Mr. Justice Holmes once said:

"Upon this point a page of history is worth a volume of logic." *N. Y. Trust Co. v. Eisner* (1921), 256 U. S. 345, 349.

The history of the origins of the incontestable clause is indisputable. No court, except the District Court in this case, has ever construed the clause as operating in *favor* of the insurance company and *against* its insured.

The clause has become part of the standard boilerplate of all insurance policies. The tradition has become so strong that many times its insertion has become essentially meaningless. Thus, in the annuity policies issued by the defendants Manufacturers and Dominion in this case, the incontestable clause is to be found. Obviously, the insured does not need the clause to protect him in such an instance. He is insuring against the hazards of longevity, not premature death. So far, no company has ever tried to void an annuity because of an applicant's fraudulent concealment of his *good* health.

Appellants submit that the insertion of the incontestable clause in annuity contracts merely demonstrates that the clause has become boilerplate that is traditionally inserted whether applicable or not. A comparable instance is provided by the thousands of printed

leases that are executed annually in Southern California and Arizona, each solemnly spelling out the duties of landlord and tenant with respect to the removal of snow on the sidewalk.

Simply because an inapplicable standard clause has been incorporated into a contract, its historical meaning has not been changed. However, the District Court reasoned otherwise and concluded that since the annuitants did not need the protection of incontestability, "therefore the incontestable clauses contained therein (in the annuities) are for the benefit of the issuing companies." [R. 58].

Appellants respectfully submit that it was error for the court below to take a standard boilerplate provision, historically designed to *protect* the insured, and to ascribe to it the power to *strike down* the insureds' claim for losses caused by the fraudulent and reckless misrepresentations of the companies' agents. The law does not permit a shield to be so readily transformed into a sword.

2. Legislative Action to Make Clause Mandatory.

After the Armstrong Investigation conducted in New York in 1906 by Charles Evans Hughes, various states enacted legislation *requiring* the inclusion of an incontestable clause *(The Life Insurance Contract,* Horne and Mansfield, 2nd ed. N.Y. 1948, p. 184).

Thus, in California the Insurance Code makes mandatory the insertion of an incontestable clause in burial insurance contracts (Sec. 10244), group life policies (Sec. 10206), fraternal benefit policies (Sec. 11066h) and disability insurance (Sec. 10350.2).

Clearly such legislation was enacted for the benefit of the unprotected layman, and was not designed to impose upon him a contractual bar to his prosecution of fraud upon its discovery.

In Joseph B. Maclean, *Life Insurance,* Seventh Edition, published by McGraw-Hill Book Company, Inc. (1951) the author says at p. 210:

> "The Incontestable Clause. The majority of the states require, and the policies of all companies provide, that they shall be incontestable after a stated period, usually either 1 or 2 years, from date of issue except for nonpayment of premiums. The reason for such a provision is found in the character of the life insurance contract. The contract is based on information supplied by the insured, and it is undesirable that the company's liability for payment be disputed after the insured is dead, when it may be difficult either to prove or to disprove the truth of statements made many years earlier."

II.

The Incontestable Clause Cannot Be Employed to Bar Recovery by the Insured Against an Insurer Who Has Defrauded Him.

In *Donohue v. New York Life Ins. Co.* (D. Conn.-Mar. 16, 1949), 9 F. R. D. 669, the defendant insurer was permitted to amend its answer to set up a special defense that the incontestability provision of the contract was a bar to plaintiff-insured's suit for reformation of the contract, based upon misrepresentations of the agent made 20 years before. Counsel for the company urged the District Court that leave to amend should be granted because this Court's decision in *Rich-*

ardson v. Travelers (supra) had just been called to their attention. *Richardson* had held that an incontestable clause was a good defense for the insured in a suit for reformation brought against him by his insurer. Leave to amend was granted but on September 23, 1949, the District Court ruled, 88 Fed. Supp. 594, 596, as follows:

> "Nor is dismissal here (for plaintiff's laches) to be construed as approval of the defense of incontestability. The incontestable clause is for the benefit of the insured. Even in jurisdictions which follow *Richardson v. Travelers Insurance Company,* 171 Fed. 2d 699, the clause should not be held to bar action *by the insured* for reformation." (Emphasis supplied.)

Many cases have arisen where the insured has prevailed over an insurer found guilty of fraudulent selling practices. In none of these is there any indication that the insurer raised the incontestable clause as a bar to the insured's recovery. Some of these cases are described below. [Appellants have omitted from this list those cases where the successful insured had instituted his action within two years of execution of the policy—the maximum period fixed by most incontestable policies.]

1. *Fawcett v. Sun Life Assur. Co. of Canada* (C. C. A. 10 1943), 135 F. 2d 544, 153 A. L. R. 533.

Plaintiff sought cancellation of a combination single premium assurance and annuity contract because it had been obtained by misrepresentation as to the taxability of the proceeds. The agents of defendant had represented that the Bureau of Internal Revenue had actually ruled the contracts were insurance and not

annuities and not, therefore, subject to estate tax. *No such ruling had been made.* The agents of the company had further stated that their attorneys had given the subject careful investigation; that their opinion could be relied upon, and that the opinion of the insured's attorney could not be relied upon. The question involved whether or not these representations were related only to matters of law and therefore not actionable or occupied a recognized exception to the rule because of the position of the speaker. The court resolved the question in favor of the insured holding: 1. That the false statement concerning the Bureau's ruling was one of fact, not law. 2. That the insured relied on these statements to his detriment. No mention of the incontestable clause as a defense was made in the decision.

2. *Stark v. Equitable Life* (1939), 205 Minn. 138, 285 N. W. 466.

Plaintiff sued the defendant insurance company to recover disability benefits due him under two life policies and for reinstatement of the policies which had been permitted to lapse. Defendant's agent had misrepresented that plaintiff had no valid claim for benefits under the policies because he was not confined to bed by his disability. Nine years after they were made, plaintiff discovered the falsity of the agent's statements and then brought suit. The defendant company contended that the agent's representation was a matter of law and not fact. The court ruled that misrepresentations of law are treated similarly to misrepresentations of fact where the person who misrepresents the law is learned in the field and has solicited the

trust and confidence of the party defrauded, or where the person misrepresenting the law stands in a fiduciary relationship with the person defrauded. The court held for the plaintiff insured. No mention of an incontestable clause as a defense is to be found in the decision.

3. *Forman v. Mutual Life Insurance Co.* (1917), 173 Ky. 547, 191 S. W. 285.

An authorized agent of the defendant insurance company attached a paper to the policy he sold plaintiff-insured. Defendant claimed this paper to be only an illustration of the dividends payable. Plaintiff claimed reliance upon the information in the paper and that he was induced to purchase the contract of insurance upon the truth of the statements contaned therein. The court held for the plaintiff, stating that if there is reasonable doubt as to the meaning of an insurance contract, the construction which should be adopted is one that carries out the understanding of the insured as to the meaning of the contract at the time of purchase, provided that it is fairly made to appear that his understanding of its meaning was produced by and based on representations and assurances in writing made to him by the company before or at the time the contract was executed, and that these representations and assurances were of such a nature as to reasonably induce the insured to believe that his understanding and construction of the contract would be carried out. In this case 20 years had elapsed from the purchase of the policy until the time of suit, yet no mention was made in the decision of any defense asserted by the defendant company on the basis of the incontestable clause.

4. *Rohrschneider v. Knickerbocker Life Ins. Co.* (1879), 78 N. Y. 216, 32 An. Rep. 290.

Defendant, in order to attract potential insurers, caused advertisements to be published and pamphlets to be issued, stating, in substance that it insured at half the cost in other companies, since one-half of its premiums could be paid by premium notes and that its dividends always had, and would continue to pay the notes. The dividends, as defendant's managers well knew, never had paid the premium notes and generally would fall much short of doing so. Plaintiff read the advertisements and received one of the pamphlets from an agent of the defendant; and, relying on these and other representations, took an endowment policy for $500.00 payable at her death or at the end of five years if she should then be living. During the five years she paid one-half the premiums in cash and gave her notes for the other half; at the end of each year, the note of the previous year was included in the new note. Only one small dividend was paid during the five years. At the end of the five years she demanded the $500.00, but defendant would only pay the difference between that sum and the amount of the last note. Held, that an action for fraud was maintainable, as there was a false representation of a specific fact material to the transaction; and that plaintiff was not estopped, by allowing the contract to run to maturity, from asserting the fraud, as there were no means of discovering it prior to that time. Although the policy was permitted to run to maturity, no mention was made in the decision of any attempted defense on the basis of an incontestability clause.

5. *Harwood v. Security Mutual Life Ins. Co.* (1928), 263 Mass. 341, 161 N. E. 589.

The insurance company falsely represented material facts as to the nature of the policy, and its wording did not disclose the falsity of the representation. The insured was thereby induced to purchase the policy and to pay premiums for a type of policy which he did not want and which was more costly than represented. Held: upon discovering the falsity of the representation the insured could rescind the contract and recover the premiums paid. Although this policy was in effect for 23 years, no mention was made in the decision of any defense offered by defendant based upon the incontestable clause.

III.

Ambiguities in a Policy Are to Be Construed in Favor of the Insured.

Since an insurance policy is drawn by the insurer and since the insurer is required to use such language as will make the provisions of the contract clear to the ordinary mind, any ambiguity, uncertainty, or reasonable doubt is to be resolved by a construction in favor of the insured.

> "If there is doubt whether the words of a contract of insurance were used in an enlarged or restrictive sense, other things being equal, that construction will be adopted which is most beneficial to the insured."
>
> *Pendell v. Westland Life Ins. Co.* (1950), 95 Cal. App. 2d 766.

This point is extensively annotated under Section 380 of Deering's Annotated California Insurance Code (1963 edition) Pars. 37, 41, pages 286-292.

In *Yoshida v. Liberty Mutual* (C. A. 9-1957), 240 F. 2d 824, 826 the rule is stated that:

> "This Court has recognized and adhered to the well-settled rule of construction that where ambiguity or uncertainty exists in an insurance contract, such ambiguity or uncertainty will be resolved adversely to the insurer."

In *Steven v. Fidelity & Cas. Co.* (1962), 58 Cal. 2d 862, 879, the court said:

> "In standardized contracts, such as the instant one (an insurance policy), which are made by parties of unequal bargaining strength, the California courts have long been disinclined to effectuate clauses of limitation of liability which are unclear, unexpected, inconspicuous or unconscionable."

IV.

An Appellate Court Is Not Bound by a Trial Court's Interpretation of an Uncertain or Ambiguous Contractual Term Where the Lower Court's Determination Was Made Without Resort to Extrinsic Evidence.

Where the problem is one of construction and the ultimate finding is a conclusion of law, the appellate court may substitute its own judgment for that of the trial court.

Bogardus v. Commissioner (1937), 302 U. S. 34, 39;

Prickett v. Royal Ins. Co. (1961), 56 Cal. 2d 234, 237, 86 A. L. R. 713;

5 C. J. S., 577 Appeal and Error, Par. 1454(a).

Conclusion.

The judgment below should be reversed and the District Court directed to proceed to try the case upon the merits.

Respectfully submitted,

KENNY, MORRIS & IBANEZ,
HURLEY and BIGLER,
By ROBERT W. KENNY,
Attorneys for the Appellants Newton.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROBERT W. KENNY,
Attorney for Appellants Newton.

No. 18674

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALBERT H. NEWTON and GENEVIEVE NEWTON,
Appellants,

vs.

NEW YORK LIFE INSURANCE COMPANY, *et al.*,
Appellees.

REPLY BRIEF FOR APPELLANTS NEWTON.

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Appellees.

REPLY BRIEF FOR APPELLANTS NEWTON.

I.

Appellees' Brief Asks This Court to Depart From the Ordinary Meaning of "Incontestable" in Interpreting the Insurance Contracts.

Appellees contend that when they employ the technical word "incontestable", it means that the incontestable clause may be used in *favor* of the insurance company and *against* the insured (Appellees Br. p. 14 *et seq.*).

It is submitted that Appellees are asking this Court to depart from the ordinary meaning of "incontestable" in interpreting the contracts at issue.

> "(a) The *ordinary meaning* of language throughout the country is given to words unless circumstances show that a different meaning is applicable."
>
> "(b) Technical terms and words of art are given their technical meaning unless the context or a

usage which is applicable indicates a different meaning."

Restatement "Contracts" 235. See also Calif. Civil Code 1645; 4 Williston "Contracts", 3rd Ed., 707, 590.

The word "incontestable" as used in insurance contracts is defined at page 1145 of Webster's Third New International Dictionary (1961) as "being such that payment of claims cannot be disputed *by a life insurance company* for any cause except nonpayment of premiums or other reason specifically stated in the contract when the contract has been in force for a stipulated period (as one or two years) and when an insurable interest existed at its inception." (Emphasis supplied.)

An almost identical definition of "incontestable" was given at page 1259 of Webster's Second New International Dictionary (1934).

It is significant that not one of the many court decisions cited in Appellees' brief refers to a situation where an insurance carrier successfully used the incontestable clause against one of its insureds.

II.

There Should Be No Difference in Interpretation When the Word "Incontestable" Is Used in an Annuity Contract.

Appellees contend that "incontestable" is meaningless in an annuity contract unless they can use it against their insureds. (Appellees Br. p. 20 *et seq.*) To this we reply:

1. If the annuity seller chooses to employ a technical word like "incontestable" in drawing a contract,

it is obliged to specify that the word was not being used in its ordinary meaning but rather in a different sense, the definition of which should be spelled out in its contract.

2. The word in its ordinary meaning is not necessarily meaningless in an annuity contract. It may be farfetched, but it is still conceivable that an annuity company might want to avoid continued payment of annuity claims to an annuitant possessed of an extraordinary longevity. Perhaps it would discover that annuitant's application had fraudulently concealed both his own good health and the persistent longevity of his ancestors. The incontestable clause, in its ordinary meaning, would then protect such an annuitant. An advance in the science of geriatrics may make it hazardous to have underwritten certain annuities and some carriers might well start thinking fondly of the fraud defenses that were used before the "incontestable clause" came into existence.

Conclusion.

The judgment below should be reversed and the District Court directed to try the case upon the merits.

Respectfully submitted,

KENNY, MORRIS & IBANEZ,
HURLEY & BIGLER,
By ROBERT W. KENNY,
Attorneys for the Appellants Newton.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROBERT W. KENNY,
Attorney for Appellants Newton.

No. 18,674

IN THE

United States Court of Appeals

For the Ninth Circuit

ALBERT H. NEWTON and GENEVIEVE NEWTON,
Plaintiffs-Appellants,

vs.

NEW YORK LIFE INSURANCE COMPANY, a corporation, MANUFACTURERS LIFE INSURANCE COMPANY, a corporation, and DOMINION LIFE ASSURANCE COMPANY, a corporation,
Defendants-Appellees and Third-Party Plaintiffs-Appellants,

LLOYD STEADMAN and WAYNE W. WENTNER,
Third-Party Defendants-Appellees.

BRIEF OF APPELLEES MANUFACTURERS LIFE INSURANCE COMPANY THE DOMINION LIFE ASSURANCE COMPANY AND LLOYD STEADMAN

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IN THE

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Defendants-Appellees and Third-Party Plaintiffs-Appellants,

LLOYD STEADMAN and WAYNE W. WENTNER,
Third-Party Defendants-Appellees.

BRIEF OF APPELLEES MANUFACTURERS LIFE INSURANCE COMPANY THE DOMINION LIFE ASSURANCE COMPANY AND LLOYD STEADMAN

STATEMENT OF PLEADINGS AND FACTS DISCLOSING BASIS OF JURISDICTION OF DISTRICT COURT AND OF COURT OF APPEALS TO REVIEW THE JUDGMENTS

The statutory provisions which sustain the jurisdiction of the District Court are United States Code, Title 28, §§ 1332 and 1441.

The statutory provision which governs the jurisdiction of the Court of Appeals to review the judgments is United States Code, Title 28, § 1291.

The facts disclosing the basis upon which the District Court had jurisdiction and the Court of Appeals has jurisdiction to review the judgments are as follows:

"The action was commenced by the plaintiffs, Albert H. Newton and Genevieve Newton, by filing their complaint against the defendants, New York Life Insurance Company, Manufacturers Life Insurance Company and The Dominion Life Assurance Company, in the Superior Court of the State of California in and for the County of Siskiyou, on the 24th day of November, 1958." (Finding of Fact No. 2; R 50.)

"At the time the action was commenced, the plaintiffs, Albert H. Newton and Genevieve Newton, were, they have been at all times since and they are now residents and citizens of the State of California and of no other State." (Finding of Fact No. 3; R 50.)

"At the time the action was commenced, defendant New York Life Insurance Company was, it has been at all times since and it is now a corporation incorporated by and having its principal place of business in the State of New York, and a citizen of the State of New York and not of the State of California; at the time the action was commenced, defendant Manufacturers Life Insurance Company was, it has been at all times since and it is now a corporation incorporated by and having its principal place of business

in the Dominion of Canada, and a citizen of the Dominion of Canada and not of the State of California, and, at the time the action was commenced, defendant The Dominion Life Assurance Company was, it has been at all times since and it is now a corporation incorporated by and having its principal place of business in the Dominion of Canada, and a citizen of the Dominion of Canada and not of the State of California." (Finding of Fact No. 4; R 50-51.)

"At the time the action was commenced, the matter in controversy exceeded, it has at all times since exceeded and it now exceeds the sum or value of $10,000, exclusive of interest and costs." (Finding of Fact No. 5; R 51.)

"On the 15th day of December, 1958, the action was duly and regularly removed to this [District] Court." (Finding of Fact No. 6; R 51.)

"Thereafter, by and with leave of this [District] Court, each of the said defendants, as a third-party plaintiff, served a summons upon and served and filed a third-party complaint against Lloyd Steadman and Wayne W. Wentner as third-party defendants, claiming and asserting that, if judgment should be rendered for the plaintiffs against the defendants, or any of them, the third-party defendants should be held liable to the said defendants, as third-party plaintiffs, for the amount thereof." (Finding of Fact No. 7; R 51.) (See Federal Rules of Civil Procedure, Rule 14.)

"By and with the consent of all parties hereto, and pursuant to Rule 42(b) of the Federal Rules of Civil Procedure, this action came on regularly for the trial

of one separate issue, before the [District] Court, sitting without a jury, on the 14th day of August, 1962, and was duly submitted to the Court for consideration and decision, and the Court, having considered the evidence and the arguments presented, and being fully advised in the premises, * * * made and filed herein on the 21st day of November, 1962, its Memorandum and Order whereby judgments were rendered in favor of the defendants, Manufacturers Life Insurance Company, The Dominion Life Assurance Company and New York Life Insurance Company, against the plaintiffs, Albert H. Newton and Genevieve Newton, * * *." (Findings of Fact and Conclusions of Law; R 49-50.)

On March 1, 1963, the Judge of the District Court signed and filed a Judgment whereby it was Ordered and Adjudged that the defendants, Manufacturers Life Insurance Company, The Dominion Life Assurance Company and New York Life Insurance Company, have judgment against the plaintiffs, Albert H. Newton and Genevieve Newton, that their action against the said defendants be dismissed and that each of the said defendants recover from the said plaintiffs its costs, and that the third-party defendants, Lloyd Steadman and Wayne W. Wentner, have judgment against the third-party plaintiffs, Manufacturers Life Insurance Company, The Dominion Life Assurance Company and New York Life Insurance Company, that their third-party actions against the said third-party defendants be dismissed and that each of the said third-party defendants recover from

the said third-party plaintiffs his costs. (Judgment; R 61-62.)

The Court of Appeals has held that this Judgment was "entered" on March 5, 1963. (See Opinion of Court of Appeals filed on June 20, 1963.)

The Notice of Appeal by the Plaintiffs was filed on April 3, 1963. (R 69.)

The Notices of Appeal by Manufacturers Life Insurance Company, The Dominion Life Assurance Company and New York Life Insurance Company as third-party plaintiffs were filed on March 29, 1963. (R 73-78.)

It should be noted that, in a case such as this, where the plaintiffs did not sue the third-party defendants, sought no recovery against the third-party defendants and do not have a judgment or judgments against the third-party defendants, no independent jurisdictional ground is required for the third-party actions, and, particularly, that diversity of citizenship is not required either between the plaintiffs and the third-party defendants or between the defendants as third-party plaintiffs and the third-party defendants. (See Moore's Federal Practice, Second Edition, 1948, Volume 3, pages 494-496, and 1962 Cumulative Supplement to Volume 3, pages 66-67, note 6, where cases are collected; and, to same effect, see Barron and Holtzoff, Federal Practice and Procedure, Volume 1A, 1960, pages 650-651.)

STATEMENT OF CASE

This was an action for damages for alleged fraud, concealment and misrepresentation in the issuance and sale of certain life insurance and annuity policies and contracts. The defendants and third-party defendants denied all of the charges of the plaintiffs and also asserted other defenses. (R 50.)

One of the defenses raised was that the action was barred for failure to bring suit within the time prescribed in the Incontestable Clauses contained in all of the annuity contracts and life insurance policies involved in the action. (R 51-52.)

By and with the consent of all parties, a separate trial was had on this defense pursuant to Rule 42(b) of the Federal Rules of Civil Procedure. (R 49, 52.) It was *agreed* between the plaintiffs on the one hand and the defendants and third-party defendants on the other hand that a ruling on this defense in favor of the defendants and third-party defendants would entitle the defendants to judgment against the plaintiffs. (R 52.)

The specific and only questions presented to the Trial Court for determination were:

> (1) Whether the periods specified in the Incontestable Clauses began to run from the dates of issue of the policies and contracts, or at the time the plaintiffs discovered, or in the exercise of reasonable care should have discovered, the alleged fraud upon which this action was based; and

(2) Whether the Incontestable Clauses are for the benefit of the insurers and issuing companies, as well as for the benefit of the insureds and annuitants. (R 52-53.)

Each contract and policy involved contains an Entire Contract Clause (wherein it is stated that the written instrument is the entire agreement between the parties) and an Incontestable Clause. (R 53-57.) While there is some variation in the language of the Clauses in the different instruments, the provisions are substantially similar, and the following provisions from the annuity contracts issued by Manufacturers Life Insurance Company (R 53-54) are illustrative of all:

"THE CONTRACT. This contract is issued in consideration of the application therefor, and of the statements and agreements therein contained and, together with the application (a copy of which is attached hereto and made a part hereof), constitutes the entire contract. . . .

. . .

"No provision or condition of this contract may be waived or modified except by an endorsement signed by the President, Vice President or Secretary.

"INCONTESTABILITY. This contract shall be incontestable after it has been in force during the lifetime of the Annuitant for two years from date of issue."

The Trial Judge found that the contracts and policies issued by the defendants constituted the entire

agreements between the plaintiffs and defendants respectively (R 57) and that the Incontestable Clauses were clear and unambiguous. (R 57.) The Court held that the periods specified in the Clauses began to run from the dates of issue of the various contracts and policies (R 57) and that the Clauses were for the benefit of the insurers and issuing companies as well as for the benefit of the insureds and annuitants. (R 57.) The time specified in the Incontestable Clauses having expired, the Court rendered judgment for the defendants accordingly.

The case of *Anderson v. Knox,* 297 F. 2d 702, cited by the appellants, is not even remotely pertinent to the issue presented on this appeal.[1]

BACKGROUND

As noted, the issue presented to the Trial Court was narrow. The only questions presented were those set forth above, but there are certain well founded and irrefutable principles of law upon which the Trial Court's ruling was based. These principles are the postulates upon which the Judgment is based and are set forth here, with supporting authorities, solely as background material.

---

[1]Throughout this brief, the word "appellants" refers to Dr. and Mrs. Newton, the plaintiffs below.

1. An Incontestable Clause is in the Nature of and Serves a Similar Purpose as the Statute of Limitations.

The concept and purpose of an Incontestable Clause is well expressed in 1 Appleman, *Insurance Law and Practice,* page 347, where it is stated:

> "The incontestable clauses are particularly enforced by the courts because of the desirable purpose which they have. It is their purpose to put a checkmate upon litigation; to prevent, after the lapse of a certain period of time, an expensive resort to the courts—expensive both from the point of view of the litigants and the citizens of the state. In that way, it is a statute of limitations upon the right to maintain certain actions or certain defenses, * * *"

In *Dibble v. Reliance Life Insurance Company,* 170 Cal. 199, 209, 149 P. 171, 174, the California Supreme Court stated:

> "It [an Incontestable Clause] is not a stipulation absolutely to waive all defenses and to condone fraud. On the contrary, it recognizes fraud and all other defenses but it provides ample time and opportunity within which they may be, but beyond which they may not be, established. It is in the nature of and serves a similar purpose as statutes of limitations and repose, the wisdom of which is apparent to all reasonable minds. * * * The parties to a contract may provide for a shorter limitation than that fixed by law and such an agreement is in accord with the policy of statutes of that character."

2. **Incontestable Clauses Bar Actions Involving Fraud in the Issuance and Sale of Annuities and Insurance Policies.**

An Incontestable Clause bars so-called "inception" claims and defenses, that is, matters pertaining to the validity of the contract in its inception, including fraud. In *Mutual Life Insurance Co. v. Margolis,* 11 Cal. App. 2d 382, 384, 53 P. 2d 1017, 1018, the Court held:

> "The validity of a so-called incontestability clause in a contract of insurance is fully established in this state in the case of *Dibble v. Reliance Life Ins. Co.,* 170 Cal. 199, which upholds the sufficiency of such provisions in a life insurance contract and quotes from many authorities to support its conclusion. It is there held, which answers the first contention of appellant, that such a clause in a contract of insurance does not waive all defenses and condone fraud, but in so far as it allows a reasonable opportunity to discover the fraud and grants ample time to present the defense of fraud, it is only fixing a shorter period of limitation than that provided by the general statute of limitations, and acts as a further statute of repose, which in accord with well-established principles of law the legislature can do. The Supreme Court said, adopting the opinion of Mr. Justice Burnett of this Court: '. . . it was not the object of the parties to said insurance policy to exempt the insured from the consequences of his fraud, but the object and effect of said incontestable clause was simply to provide a shorter term for maintaining said claim than is prescribed by the statute of limitations. In other words, in my opinion, by said section

(1668, Civ. Code) the legislature did not intend to condemn a contract that in the interest of repose and security would fix a reasonable limit for the time in which such defense might be successfully urged, but the intention was to preclude a contract that would altogether relieve either party of the consequence of his own fraud.' "

3. Incontestable Clauses Bar Actions for Damages for Fraud as Well as Actions for Rescission.

An Incontestable Clause is equally efficacious to bar actions for damages for fraud as well as actions for rescission. In the instant case the appellants have surrendered the contracts and policies according to their terms for their stated and agreed value (R 31), and by this action now seek to recover an additional sum as damages for an alleged fraud in the issuance of the contracts. This action is as much a "contest" of the contracts within the meaning of the incontestable clauses thereof as though the appellants had sued in rescission. A similar procedure as here employed by the appellants was condemned in *Columbian National Life Insurance Company v. Wallerstein* (CA 7) 91 F. 2d 351. In that case the plaintiff insurer, having been induced to issue a life and disability insurance policy by the fraudulent misrepresentations of the insured, and being barred by the incontestable clause of the policy from denying the insured's claim for benefits, sued the insured for damages on account of the fraud. Holding that the action was barred by the incontestable clause in the policy, the Court quoted with approval from the opinion of the District Court, as follows (page 352):

> " 'If plaintiff is permitted to succeed under its theory, it is doing indirectly what it has contracted it cannot do directly. It would be rather an anomalous proceeding to hold that defendant may recover against plaintiff under the terms of his fraudulent contract and plaintiff would not be permitted to defend any suit because it has contracted away its right to do so, and yet hold that defendant is liable in damages to the plaintiff. * * * The incontestability clause is * * * in the nature of a statute of limitation and repose, and while conscious fraud practiced in inducing another to act, to his detriment, is extremely obnoxious, yet the law recognizes that there should be a limitation of time in which an action may be brought or a defense set up. The parties in the case at bar have contracted that this limitation shall be one year.' "

And see *New York Life Insurance Company v. Weaver's Administrator,* 114 Ky. 295, 70 SW 628, 629, where the Court said:

> "Besides, if, as appellant [the insurer] seems to concede, the incontestable clause in the policy precluded them from resisting its payment on the ground of fraud, it logically follows that it is equally efficacious to defeat any action brought against the estate of the decedent for damages by reason thereof."

It is against this background of postulates that the parties reached their agreement (R 52) that a decision in favor of the defendants on the narrow question presented to the Court would entitle the defendants to judgment.

STATEMENT OF ISSUE

The appellants have abandoned on this appeal their contention made in the District Court that the periods prescribed in the Incontestable Clauses commence to run only from the date of the alleged discovery of fraud. Therefore, the single issue presented to this Court for determination is:

> Are the Incontestable Clauses in annuity contracts and life insurance policies for the benefit of the issuing companies and insurers as well as for the benefit of the annuitants and insureds?

ARGUMENT

I

THE INCONTESTABLE CLAUSES ARE CLEAR AND UNAMBIGUOUS AND ARE FOR THE BENEFIT OF EITHER PARTY TO THE CONTRACT.

The Incontestable Clauses contained in the contracts and policies involved in this action are clear, explicit and unambiguous, and are for the benefit of either party to the contract. Indeed this conclusion is recognized by the very first authority cited by the appellants in their Opening Brief, at page 4. They there refer to page 188 of "The Life Insurance Contract", by Horne and Mansfield, 2nd ed., N.Y. 1948, but they have failed to inform this Court that on the two pages immediately preceding their reference, Horne and Mansfield take a position directly contrary to the position taken by the appellants on this appeal. At pages 186-187 this work states:

> "The effect of the exceptions in the clause has been to suggest to many courts the application of 'expressio unius est exclusio alterius' and the psychological result of this has been to divert attention of the court from the real meaning of the clause; i.e., that after the stipulated period *the terms of the policy must be carried out—the contract* cannot be contested, and by implication, none of its terms can be contested *by either party.* The clause does not provide that the policy 'shall be incontestable by the insurer' any more than 'by the insured.'" (The emphasis in this quotation is that of the authors; it has not been added by us.)

The clauses involved *say:* "This contract shall be incontestable". The appellants are attempting to assert that this *means* something entirely different: This contract shall be incontestable *by the insurer but not by the insured.* But the appellants are not at liberty to insert words into the Incontestable Clauses which they do not contain. As the United States Supreme Court said in *Mutual Life Insurance Co. v. Hurni Packing Co.,* 263 U.S. 167, 177, 68 L. ed. 235, 240:

> "In order to give the [Incontestable] clause the meaning which the petitioner ascribes to it, it would be necessary to supply words which it does not at present contain. The provision plainly is that the policy shall be incontestable upon the simple condition that two years shall have elapsed from its date of issue;—not that it shall be incontestable after two years if the insured shall live, but incontestable without qualification and in any event."

In *Columbian National Life Insurance Co. v. Black* (CA 10), 35 F. 2d 571, the plaintiff sought reformation of the contract to correct a clerical error. Speaking of the Incontestable Clause the Court stated at page 577:

> "* * * *the clause is not one-sided,* and the right of the assured to have the writing express the agreement actually made is no greater than the right of the assurer." (Emphasis added.)

Similarly in *Winer v. New York Life Insurance Co.* (Fla.), 190 So. 894, the Court stated at page 900:

> "We have held that incontestable clauses are favored by the law and are for the *protection* of the insured, as well as the insurer." (Emphasis added.)

The Supreme Court of the State of California in the case of *Coodley v. New York Life Insurance Co.,* 9 Cal. 2d 269, 272, 70 P. 2d 602, 603, stated:

> "The validity and binding effect of an incontestable clause *upon the parties* to an insurance policy was sustained by this court in the case of *Dibble v. Reliance Life Ins. Co.,* 170 Cal. 199." (Emphasis added.)

It is significant that the Court said that the Clause was binding "upon the parties". It did not say that the Clause was binding upon only one of the parties.

And in *Kansas Mut. Life Ins. Co. v. Whitehead,* 123 Ky. 21, 93 SW 609, 610, the Court said:

> "The incontestable clause under consideration, on the contrary, is a reasonable stipulation op-

erating in favor of *both the contracting parties.*" (Emphasis added.)

The words of the Court in *Dorman v. John Hancock Mutual Life Insurance Company* (D.C. S.D. Cal.,) 25 F. Supp. 889, 890, 891, 893 (affirmed 108 F. 2d 220), seem particularly appropriate to this action. Speaking of the Incontestable Clause and the Entire Contract clause contained in the policy there involved, the Court stated:

> "The group policy contained an incontestability clause reading: 'This policy shall be incontestable after one year from the date of issue except for non-payment of premiums.'
>
> * * *
>
> "At the outset, we must bear in mind that, under the law of California, incontestability clauses are contractual limitations akin to statutory limitations of actions and preclude 'any defense after the stipulated period on account of false statements warranted to be true, even though such statements were fraudulently made, unless by the terms of the policy fraud is expressly or impliedly excepted from the effect of such provision.'
>
> * * *
>
> "An incontestability clause excludes all grounds of contest not mentioned in it. See Mutual Reserve Fund Life Ass'n v. Austin, 1 Cir., 1905, 142 F. 398, 6 L.R.A., N.S., 1064; Equitable Life Assurance Society v. Deem, 4 Cir. 1937, 91 F.2d 569; New York Life Insurance Company v. Kaufman, 9 Cir., 1935, 78 F.2d 398. In the case first cited, the Court said (page 401):

"'The term "incontestable" is of great breadth. It is the "policy" which is to be incontestable. We think the language broad enough to cover all grounds for contest not specially excepted in that clause.'

* * * * * * *

"The policy here under consideration * * provides:

"'Entire Contract. This policy, with the application of the Employer and the individual applications, if any, of the Employees insured, copies of which are attached hereto, shall constitute the entire contract between the parties. All statements made by the Employer or by the individual employees shall, in the absence of fraud, be deemed representations and not warranties, and no statement shall be used in defense of a claim under this policy unless it is contained in the written application. Only the President, Vice-President, Secretary or Assistant Secretary has power on behalf of the Company to make or modify this contract of insurance.'

"In effect, the written statements of both parties contained in the policy, the application of the employer and the individual applications of the employee, which by this very clause are declared to 'constitute the entire contract between the parties', are the measure of the insurer's responsibility.

"Clauses of this character work both ways. They aim to protect both sides against resort to outside evidence in order to assert rights not granted or specifically excluded."

The appellants have cited several texts in their brief. None of these works states that Incontestable

Clauses are not for the benefit of the issuing company. And, as noted above, the only text that considers the issue, "The Life Insurance Contract", by Horne and Mansfield, states unequivocally that the clause prevents a contest by *either* party. (Supra, page 14.) Accordingly, with the exception noted, the cited texts are not germane to the issue.

The only case authority relied upon by appellants which even mentions incontestable clauses is a dictum by the trial judge in *Donohue v. New York Life Insurance Co.* (D.C. Conn.), 88 F. Supp. 594, 596. That dictum, which is contained in a one paragraph comment tacked on to a decision in favor of the insurer on another ground, with no citation of authority to support the dictum, was rejected by the District Court in the case at bar. (R 45-46.)

The cases of *Fawcett v. Sun Life Assur. Co. of Canada* (CA 10), 135 F. 2d 544; *Stark v. Equitable Life,* 205 Minn. 138, 285 N.W. 466; *Forman v. Mutual Life Insurance Co.,* 173 Ky. 547, 191 S.W. 285; *Rohrschneider v. Knickerbocker Life Ins. Co.,* 76 N.Y. 216, and *Harwood v. Security Mutual Life Ins. Co.,* 263 Mass. 341, 161 N.E. 589, referred to in the appellants' Opening Brief, are not even remotely in point. The appellants ask this Court to speculate why Incontestable Clauses were not mentioned in these cases. Even without knowing the terms of the individual policies or the law in each of the separate states, a good reason for not mentioning such clauses (if there were such clauses) is apparent from the decisions in most of the cases. Three of the cases

(*Fawcett, Stark* and *Harwood*) test the sufficiency of the plaintiff's complaint by demurrer or other procedural device, and quite obviously a defense of incontestability would not yet have been asserted in such a proceeding. Another of appellants' cases was decided in 1879 (*Rohrschneider v. Knickerbocker Life Ins. Co.,* 76 N.Y. 216) and there is nothing in the opinion to indicate whether Knickerbocker Life was using incontestability clauses at this early date. *Forman v. Mutual Life Ins. Co.,* 173 Ky. 547, 191 S.W. 279, is not in point, since it was an action *on* the contract to compel payment of the amount due under the contract.

Under the guise of interpretation and construction, the appellants ask this Court to rewrite the incontestable clauses in the contracts. The appellants refer to the well settled rule of law that ambiguities in an insurance contract will be resolved against the insurer. But it is equally well settled that where the terms of the contract are clear the Court will not indulge in a forced construction. As the Supreme Court of the State of California stated in *Long v. West Coast Life Insurance Co.,* 16 Cal. 2d 19, 24, 104 P. 2d 646, 649:

> "* * * while it is the rule that insurance policies should be construed liberally in favor of the insured, *the court cannot interpolate provisions in any insurance policy which provisions do not in fact exist.*" (Emphasis ours.)

See also *New York Life Insurance Co. v. Hollender,* 38 Cal. 2d 73, 81, 237 P. 2d 510, 514.

Significantly, the appellants have not even attempted to point out wherein lies any ambiguity or uncertainty in the Incontestable Clauses involved in this action. This Court, however, has specifically held in the case of *Richardson v. Travelers Ins. Co.,* 171 F. 2d 699, at page 700 that:

> "The wording of the incontestable clause is unambiguous."[2]

The California Courts also have held that Incontestable Clauses are unambiguous. (See *Mutual Life Ins. Co. v. Margolis,* 11 Cal. App. 2d 382, 53 P. 2d 1017.)

II

INCONTESTABLE CLAUSES IN ANNUITY CONTRACTS MUST OPERATE IN FAVOR OF THE ISSUING COMPANY.

The construction placed upon the Incontestable Clauses by the appellants is not only contrary to the plain meaning of the clauses themselves, but also renders the clauses *meaningless* in annuity contracts. Defendants Manufacturers and Dominion sold only single premium annuity contracts to the appellants. (R 44, 53-55.) Annuity contracts are basically and fundamentally different from life insurance policies. The differences are well summarized in 1 Appleman,

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[2]Although the ultimate conclusion of *Richardson* has been questioned and distinguished (see *New York Life Ins. Co. v. Hollender,* 38 Cal.2d 73, 83, 84, 237 P.2d 510, 515, 516; *Mutual Life Ins. Co. v. Simon* (D.C. S.D. N.Y.), 151 F. Supp. 408, 414, 415; *Flax v. Prudential Insurance Co. of America* (D.C. S.D. Cal.) 148 F. Supp. 720, 726), no court has questioned the proposition that the incontestable clauses are unambiguous.

Insurance Law and Practice, Section 83, Page 76, viz.:

> "Ordinarily, it is recognized, even by laymen, that contracts of life insurance and of annuity are distinctly different. One involves payments of stated amounts, known as premiums, by the insured over a period of years in return for which the insurer creates an immediate estate in a fixed amount in the event of his death while in good standing. * * * There is an immediate hazard of loss thrown upon the insurer, with the required performance by the insured of certain obligations at designated intervals of time.
>
> "An annuity contract is almost diametrically opposed to this. The person designated as the recipient is the person paying the money. He pays in a fixed sum at one time, in return for which the company must then perform a series of obligations over a period of years, at designated times. The hazard of loss is no longer upon the company but upon the recipient who may die before any benefits are received. Instead of creating an immediate estate for the benefit of others, he has reduced his immediate estate in favor of future contingent income. The positions are almost exactly reversed. Annuity contracts must, therefore, be recognized as investments rather than as insurance."

In *Estate of Barr,* 104 Cal.App.2d 506, 508, 231 P. 2d 876, 878, the Court stated as follows:

> " 'From the viewpoint of risk, a life insurance policy and an annuity contract are, in fact, diametrically different. Under the former the com-

> pany will lose in the event of the insured's premature death; under the latter the company will gain.' ''(Quoting Randolph Paul, Federal Estate and Gift Taxation, Vol. I, p. 498.)

And in *Equitable Life Assur. Soc. v. Johnson,* 53 Cal. App. 2d 49, 57, 127 P. 2d 95, 99, the Court said:

> "It is quite clear that an annuity contract differs from a life insurance contract. The risk is fundamentally different in the two contracts. In a life insurance policy the risk assumed is to pay upon the assured's death; in a pure annuity contract the risk assumed is to pay as long as the assured may live."

Unless the Incontestable Clauses contained in the annuity contracts issued by Manufacturers and Dominion operate in favor of the companies, they are *meaningless.* In a single premium deferred refund annuity, the type here involved, there is no benefit which can flow to the annuitant from an incontestable clause. This is simply because of the nature of the contracts. These annuities are investment contracts which are available to the public for a fixed price and without regard to insurability. There is no insurer, no insured, and no insurance, as such, in these contracts and, once issued, the company will *never have occasion or reason to contest them.* All the criteria of insurability in a life insurance policy are as immaterial in an annuity contract as in the sale of a share of stock or a government bond. No medical examination is required. The health, habits, character, occupation, etc. of the annuitant are of no impor-

tance or significance to the company in issuing an annuity of this type. To illustrate, the application for the contract (see Manufacturers exhibits C and D) asks only for basic informational data, such as name, address, beneficiary, etc. There is no way the company could be deceived into issuing such an annuity, nor is there any conceivable reason why the company would wish to contest the contract within the meaning of the incontestable clause after it had issued it.[3] Because of this irrefutable fact, it is apparent that the incontestable clause is devoid of meaning unless it is for the benefit of the company. The true and only purpose which can be ascribed to the incontestable clause in an annuity is to bar the very type of action brought by the appellants many years after the issuance of the contracts.

It is obvious that the appellants' views of the purpose of an incontestable clause cannot be applicable to an annuity. Appellants contend that the purpose of the clause was to prevent a contest of a life policy on the insured's death, many years after its issuance. But the liability of a life insurer *matures* on death, while that of the promissor in an annuity contract, except for final refund features, if any, *terminates* upon death. It is, therefore, illogical to suppose that the purpose of the clause in an annuity is to prevent

[3]A misstatement of age by the applicant is not an exception. While the age of the annuitant is of importance in fixing the amount of periodic payments, each contract has an Age Adjustment Clause which operates to correct the effect of an erroneous statement of age. The operation of the Age Clause is not precluded by the incontestable clause. (See *New York Life Ins. Co. v. Hollender,* 38 Cal.2d 73, 237 P.2d 510.)

the company from commencing a contest of its contract on the death of the annuitant, *after* it had fully performed its agreement and *after* its liability thereon had *terminated.*

The appellants apparently concede that the Incontestable Clause in an annuity contract must operate in favor of the company (see appellants' Opening Brief, page 6), but seek to avoid the effect of the clause by stamping it as "boilerplate". The appellants' efforts in this regard are insufficient as a matter of law. The Court must give effect to each provision of the contract.

> "In construing life insurance policies as in the construction of other contracts, the entire contract is to be construed together for the purpose of giving force and effect to each clause."
>
> *New York Life Ins. Co. v. Hollender*, 38 Cal. 2d 73, 81, 237 P. 2d 510, 514.

As Chief Justice Waste of the California Supreme Court stated in *Ogburn v. Travelers Ins. Co.*, 207 Cal. 50, 52, 267 P. 1004, 1005:

> "In the interpretation of a written instrument the primary object is to ascertain and carry out the intention of the parties thereto. (Citations) This fundamental rule finds recognition in Section 1636 of our Civil Code, wherein it is provided that 'A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.' As to the hardships, advantages or disadvantages which may result from such a construction, the courts have

> nothing to do. (Citation) The intention of the parties is, of course, to be ascertained from a consideration of the language employed by them and the subject matter of the agreement. (Citation) A contract should be construed, however, as an entirety, the intention being gathered from the whole instrument, taking it by its four corners. *Every part thereof should be given some effect.*" (Emphasis added.)

Confronted with the overwhelming logic of the conclusion of the District Court that the inclusion of an incontestable clause in an annuity contract must be primarily for the benefit of the issuing company (R 46-47, 58), the appellants suggest that "many times" the insertion of the clause has become "essentially meaningless" (whatever that means). They attempt to illustrate by saying that "A comparable instance is provided by the thousands of printed leases that are executed annually in Southern California and Arizona, each solemnly spelling out the duties of landlord and tenant with respect to removal of snow on the sidewalk." (Appellants' Opening Brief, pages 6-7.) But it does not follow, as the appellants would imply, that, if and when it does snow in either southern California or Arizona, those provisions are not fully effective, and binding upon the party obligated to remove the snow.

So, also, is it in the case of an insurance policy. In the rare case where the insurer is charged with fraud, the incontestable clause, which by its terms works both ways, is available to the insurer as a defense, just

as it would be to the insured if he were charged with fraud.

It has been demonstrated that the incontestable clause in an annuity contract must *necessarily* operate in favor of the company or it is meaningless. The language of the clauses, however, in both the annuity contracts and the life insurance policies is substantially identical, and diametrically opposed meanings cannot be ascribed to the same words. Accordingly, the conclusion is inescapable that the incontestable clause in a life policy must be and is for the benefit of an insurer as well as an insured. This conclusion is in accord with not only the purpose of the clause, the authorities cited, logic and reason, but with the clear and explicit terms of the clauses themselves.

CONCLUSION

The judgment of the Trial Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF ATTORNEY RESPONSIBLE FOR THE PREPARATION OF THIS BRIEF

I certify that I am one of the attorneys responsible for the preparation of this brief; that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

RICHARD J. KILMARTIN,
Attorney.

No. 18,674

IN THE

United States Court of Appeals

For the Ninth Circuit

ALBERT H. NEWTON and GENEVIEVE NEWTON,
Plaintiffs-Appellants,

vs.

NEW YORK LIFE INSURANCE COMPANY, a corporation, MANUFACTURERS LIFE INSURANCE COMPANY, a corporation, and DOMINION LIFE ASSURANCE COMPANY, a corporation,
Defendants-Appellees and Third Party Plaintiffs-Appellants.

PETITION FOR REHEARING BY APPELLEES MANUFACTURERS LIFE INSURANCE COMPANY AND THE DOMINION LIFE ASSURANCE COMPANY

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No. 18,674

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Defendants-Appellees and Third Party Plaintiffs-Appellants.

PETITION FOR REHEARING BY APPELLEES MANUFACTURERS LIFE INSURANCE COMPANY AND THE DOMINION LIFE ASSURANCE COMPANY

This Petition for Rehearing is filed by the Appellees MANUFACTURERS LIFE INSURANCE COMPANY and THE DOMINION LIFE ASSURANCE COMPANY only. These Petitioners issued only single premium deferred refund annuities in this case and this Petition is, therefore, addressed solely to the opinion of this Court insofar as it pertains to annuity contracts. It is respectfully submitted that a rehearing should be granted Petitioners in this case for the following reasons:

1. This Court committed serious and patent error in refusing to give any meaning to the incontestable clauses contained in the annuity contracts involved in this action. This refusal is contrary to the mandate of California law, which this Court is bound to follow in this case, and is violative of basic and fundamental principles of contract construction.

2. This Court erred in making the following statement at page 6 of its opinion after referring to a dictum in the case of *Donohue v. New York Life Insurance Company,* 88 F.Supp. 594:

> "That is all the courts have said on the subject in any case in which comment was relevant."

This statement totally ignores all of the cases cited by the Trial Court in its Decision and by Appellees in their brief which comment that an incontestable clause operates in favor of both parties to the contract.*

3. This Court erred on page 6 of its opinion in accepting Appellants' speculative argument that in certain cases cited by them an incontestable clause, if applicable, would have won the Company's case for it. This portion of the Court's opinion has ignored the obvious fact that an in-

*Petitioners further question the significance of the asserted "fact" that no insurance company, except in the *Donohue* case, "in reported litigation" has asserted the clause as a defense. There may well be many instances where the clause was successfully relied on and no appeal was taken. Except in the federal courts, practically no trial court decisions are reported.

contestable clause could not have been pertinent to the decisions in those cases.

4. This Court erred at page 7 of its opinion in referring to or drawing any conclusion from the irrelevant fact that a so-called "impaired annuity" may be secured in some instances. No such contracts are involved in this case. The contracts involved in this action are in evidence and available for the Court's examination. Each contract is a single premium deferred refund annuity, and not an impaired annuity. Accordingly, the Court's hypothetical observations not only have no basis in the Record of this case but are totally immaterial to the issue presented for decision.

5. This Court has misconceived the meaning of the statement appearing at page 100 of Annuities and Their Uses, 2nd Ed., by Clyde J. Crobaugh (1933):

> "The incontestable clause is for the benefit of the annuitant. It would be an undesirable condition if the payment of the annuity could be disputed by the insurer many years after the contract had been issued when it might be difficult for the annuitant to submit proof of statements (except as to age and identity) made at the time the contract was secured."

There are no annuity contracts involved in this action which were issued upon statements made by the applicant other than as to age and identity. Accordingly, the quoted text has no application to this case at all. Respectfully, however, it must be stated that the quoted matter has been taken out of context by this Court and to derive the true meaning of this statement, Mr. Crobaugh's entire book must be considered. Occasionally an annuity contract is combined with some form of *insurance* feature such as an accidental death benefit or disability benefits. These added features provide true insurance protection and not annuity benefits. Statements made by the applicant to secure these insurance benefits obtain the protection of an incontestable clause. Similarly, there are certain

contracts which bear the label "annuity" which are in reality life insurance policies and not annuity contracts. For example, at page 71 of Mr. Crobaugh's text, he describes a survivorship annuity which is nothing more than a life insurance policy on one person, payable in the form of an annuity to the beneficiary upon the death of the life insured. While such contracts are called annuities, it is obvious that they are in reality life insurance policies. It is equally obvious that an incontestable clause in such a contract could benefit the insured who is called, for the purpose of the contract, the annuitant. It was to such "annuitants" that Mr. Crobaugh obviously referred when he made the above statement. Such statement has no application to the annuitants or annuities involved in this case.

6. The State of California has no statute requiring an incontestable clause to be contained in an annuity contract and New York law referred to at page 7 of this Court's opinion has no bearing on the issue presented to the Court for determination. It is apparent, however, that this Court has misconstrued the meaning of State statutes requiring an incontestable clause in annuity contracts. The requirement of incontestability in such statutes is directed only toward contracts issued upon statements made by the annuitant in his application other than statements as to age and identity. No such statements are involved in this case.

7. This Court erred in its conclusion at page 8 of the opinion, viz.:

> "It (an incontestable clause) does have a place in some annuity contracts, and therefore it is not remarkable that it gets written into others where it serves no purpose."

This Court has gone off the record to consider the purpose an incontestable clause might serve in a hypothetical annuity contract not involved in this case. Petitioners, therefore, feel warranted in stating that neither at the time the contracts involved in this action were issued, *nor*

at any time prior thereto, did either Petitioner issue so-called impaired annuity contracts. Therefore, contrary to this Court's holding, it would be indeed "remarkable" that the incontestable clause was written into the instant contracts by Petitioners' draftsmen as an erroneous extension of a type of contract never written by either Petitioner. The record is devoid of any matter upon which the Court's holding may be predicated.

8. This Court has erred in failing to consider the nature of an annuity contract in reaching its decision. In the text cited by the Court—Annuities and Their Uses—the author states at page 26:

> "It may be said that the annuity idea is practically the reciprocal of the life insurance principle."

This quotation forcefully demonstrates the validity, soundness and accuracy of the District Court's conclusion that:

> "The basic reasons for the hypothesis that an incontestability clause benefits the insured appear to be the same with reference to an annuity company, for in such a situation it is the annuitant (like the insurance company insurer in the life insurance situation) who bears the risk of loss. Accordingly, as to the annuity contracts here involved, this is a second and separate reason why the incontestable clauses should inure to the benefit of the issuing companies."

Prior to rendering the decision in this case, the District Court, over a period of seven months, explored all facets of the issue presented. Numerous memoranda of law were required and filed, followed by the District Court's independent research. The resultant decision is predicated upon irrefutable logic and upon a strict adherence to applicable legal principles and mandate set down by the United States Supreme Court, this Court, and the Appellate Courts of California. In contradistinction, the ultimate conclusion of this Court, with respect to the annuity contracts, is based upon a patent non sequitur and a

serious and apparent departure from controlling legal concepts. The annuity contracts involved in this action had a value in excess of $530,000.00. This Court has held, in effect, that the incontestable clauses contained in these contracts were inserted by *mistake*. Such a holding is not only not supported by the Record but appears to be without judicial precedent.

In basic fairness to not only the litigants but to the Trial Judge, a rehearing should be granted or the matter heard en banc so that further consideration can be given to the issue presented. This Court has directed that the cause be remanded to the District Court for further proceedings. At a very minimum, the decision herein should be modified to inform the Trial Court whether the further proceedings directed by this Court may include the reception of evidence to prove that such clauses were not included in the annuity contracts by inadvertence or mistake.

Respectfully submitted,

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The Dominion Life Assurance Company.

Certificate of Counsel Responsible for the Preparation of This Petition for Rehearing

I certify that I am one of the attorneys responsible for the preparation of this Petition for Rehearing; that in my judgment it is well-founded and it is not interposed for delay.

Richard J. Kilmartin.

No. 18,675

United States Court of Appeals

For the Ninth Circuit

AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA, and GENERAL REINSURANCE CORPORATION,

Appellants,

vs.

IDAHO FIRST NATIONAL BANK, Executor of the Estate of V. A. ROBERTS, Deceased, and ELLEN M. ROBERTS,

Appellees.

APPELLANTS' OPENING BRIEF

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No. 18,675

United States Court of Appeals

For the Ninth Circuit

American Casualty Company of Reading, Pennsylvania, and General Reinsurance Corporation,

Appellants

vs.

Idaho First National Bank, Executor of the Estate of V. A. Roberts, Deceased, and Ellen M. Roberts,

Appellees.

APPELLANTS' OPENING BRIEF

STATEMENT RE JURISDICTION (Rule 18(b) 9th Cir.)

Pleadings and admissions in this case, as established by Pre-Trial Order, establish jurisdiction in the United States District Court for the District of Idaho, Southern Division, pursuant to 28 U.S.C.A. 1322 (Tr. pages 4-5, 30-32), as follows:

A. *Diversity of Citizenship.*

Plaintiffs: American Casualty Company organized and having its principal place of business in the State of Pennsylvania.

General Reinsurance Corporation, organized and having its principal place of business in the State of New York.

Defendants: V. A. Roberts, citizen of the State of Idaho.

Ellen M. Roberts, citizen of the State of Idaho.

V. O. Stringfellow, citizen of the State of Washington, filing general appearance in this action.

Burl A. Johnson, citizen of the State of Oklahoma, filing general appearance in this action.

Darleen M. Johnson, citizen of the State of Oklahoma, filing general appearance in this action.

B. *Amount in controversy,* exclusive of interest and costs, exceeds $10,000.00.

Service was not made upon named defendants, K. H. Vitt or Catherine Vitt and judgment has not been rendered against them.

C. *Appeal:* This appeal is from final judgment of the United States District Court for the District of Idaho, Southern Division (Tr. pages 92-96), and is appealable pursuant to the provisions of 28 U.S.C.A. 1291.

STATEMENT OF CASE

By this action the American Casualty Company sought a judgment for a sum which has been stipulated to have been necessarily and reasonably paid by it in the performance of its bonds, to-wit: $1,049,-218.63. (Tr., pp. 60, 61.)

The Court below determined that the amount of plaintiffs' loss was, as stipulated, $1,049,218.63, and that plaintiffs were entitled as a matter of law to that amount less setoffs consisting of $350,000.00, the agreed value of certain Vitt pledged assets, and an additional $30,000.00, the value of construction equipment at the Amarillo construction site at the date the joint control agreement was entered into to complete the Amarillo project. (Tr., pp. 74, 76.) The Court also determined that plaintiff American Casualty Company and General Reinsurance Corporation were entitled to interest from the date of the District Court's judgment. (Tr., p. 77.)

The Court below affirmed judgments against Burl A. Johnson, Darleen M. Johnson and V. O. Stringfellow for the full amount of the loss in favor of American Casualty and General Reinsurance Corporation. The Court also granted judgment in favor of the Roberts against the Johnsons and Stringfellow in the amount of $669,218.63, plus $15,000.00 attorney's fees, together with interest thereon.

The questions presented by this appeal are in essence, whether trial Court erred in holding that the Vitt pledge valued at $350,000.00, should be set off against amounts otherwise due American Casualty

from defendant appellees and whether the judge erred as a matter of law in computing interest from the date of judgment below instead of at an earlier date, no later than April 1, 1960, when the complaint was filed by American Casualty and General Reinsurance Corporation against the Roberts.

During the litigation V. A. Roberts died and the Idaho First National Bank, executor of his estate, was substituted as defendant. (Tr., pp. 62, 63.)

We will summarize this transaction more or less chronologically. V. O. Stringfellow, K. H. Vitt and Burl A. Johnson formed a joint venture called Stringfellow Amarillo Associates for the purpose of bidding upon a Capehart housing project to be erected for the Department of the Air Force of the United States at Amarillo Air Force Base. (Exhibit 1-A.) The project was divided into three contracts which are numbered and designated in the pre-trial order. (Tr., pages 31, 68; Exhibit 1-C.) The total contract price pursuant to this bid was $7,757,738.00. The joint venture was required under the conditions and specifications of the Air Force to obtain 100% performance and payment bonds and sought such bonds from American Casualty Company.

American Casualty Company required the joint venture to furnish, in addition to personal indemnity by the joint venturers, independent indemnity by some third party guaranteeing that American Casualty Company and its re-insurers and/or co-sureties would be saved harmless from any liability, losses, expenses, judgments, etc., should such bonds be issued as requested.

The joint venturers solicited the defendants, V. A. Roberts and Ellen M. Roberts, to provide such indemnity (Tr., pp. 68, 69), said Roberts having previously provided indemnity on other projects for a fee. (Cromwell Dep., pp. 5, 41.)

On August 28, 1958, Mr. Cromwell as attorney for the Roberts drafted a letter which was signed by Mr. Roberts (Exhibit 3), advising American Casualty Company that he would indemnify it upon the proposed payment and performance bonds to be issued in the aggregate approximate amount of $7,700,000.00 and would execute an indemnity agreement on the terms identical to the terms of the indemnity agreement entered January 18, 1957, for the Fort Huachuca Capehart Housing Project. (Cromwell Dep., p. 5; Plaintiff's Exhibit 3.) The Fort Huachuca Capehart Project referred to in Mr. Roberts' letter was a construction project under the Capehart Act in which General Insurance Company of America was the surety and Roberts the paid independent indemnitor. (Cromwell Dep., p. 5.) With the letter Roberts submitted his financial statement to American showing assets in excess of $2,500,000.00. (Exhibit 4.) The letter and financial statement were forwarded by the Roberts for the purpose of inducing American to execute surety bonds for the joint venturers. The joint venturers in turn agreed to certain conditions by telegram to V. A. Roberts. (Tr., p. 69.)

Thereafter Mr. Cromwell prepared an indemnity agreement (Exhibit 1) upon the instructions of Roberts, making some changes from the Fort Huachuca

agreement among which was a more definite manner in which the Roberts would receive their compensation for executing this agreement. The Roberts' compensation was 1% of the principal amount of the bonds and the indemnity agreement was changed so that in the Amarillo contract the Roberts would be paid monthly and would not have to wait until the completion of the job. (Cromwell Dep., pp. 6, 7.) The Roberts were fully paid all of the compensation due them under this agreement (Tr., pp. 36, 71), even though American Casualty had to finance the joint venturers well before the job was completed, spending in excess of a million dollars to complete the job.

There was attached to and made a part of the indemnity agreement (Plaintiff's Exhibit 1) a copy of the joint venture agreement, powers of attorney issued by the joint venturers, the letter of acceptance of the bid of Stringfellow Amarillo Associates by the Department of the Air Force, the housing contract between the joint venturers and the Department of the Air Force and applications of the joint venturers for bonds.

The validity of this indemnity agreement was admitted in defendants Roberts' answer. (Tr., pp. 9, 23.)

American Casualty having issued the bonds pursuant to the application and representations and agreements of defendants Roberts and the contracts having been executed, the joint venturers proceeded with the construction of the Capehart housing project at Amarillo Air Force Base.

On or about September 23, 1959, the joint venturers notified American that they would be unable to complete said contract without financial assistance. (Tr., p. 71.) American Casualty, through W. H. Bennett, immediately thereafter on September 24 notified defendants V. A. Roberts and Ellen M. Roberts (Tr., p. 71) by separately addressed registered letters to each of them (Exhibits 5 and 6) of the anticipated default and called upon them to take whatever steps were necessary in the performance of their indemnity agreement to save American harmless. Roberts, upon receipt of this notice, sent his attorney Cromwell and an engineer, Paul Wise, to Amarillo to investigate the project. Wise and Cromwell met with Bennett at Amarillo. (Tr., p. 72.) Several days were spent there. (Bennett Dep., pp. 4, 5; Cromwell Dep., pp. 10, 11 and 12.) Wise examined the project and estimated the shortages and losses in excess of a million dollars and conveyed this information to Mr. Roberts (Wise Dep., p. 4.) While at Amarillo Mr. Bennett, representing plaintiff American Casualty, asked Mr. Cromwell if Mr. Roberts would provide the financial requirements of the joint venturers or take over the job, and was advised by Cromwell that Roberts would not and could not perform his obligations under the indemnity agreement. (Cromwell Dep., p. 13.)

Thereafter, Mr. Wise, Mr. Cromwell, Mr. Bennett and Mr. Vitt came to Boise and met with Mr. Roberts at his home. At that time Mr. Bennett again asked Mr. Roberts what he intended to do relative

to saving American Casualty harmless from liability and about providing money for the project. Discussion was had concerning Mr. Roberts' holdings of Morrison-Knudsen Company capital stock and the effect of the liquidation of this stock, as well as other matters. The Roberts refused to take any action or do anything in the performance of their obligations. (Cromwell Dep., p. 17; Wise Dep., p. 11; Bennett Dep., pp. 14, 15, 18 and 49.)

Subsequent to this time American further contacted Roberts requesting him to obtain or guarantee a bank loan to provide funds to the joint venturers to complete the Amarillo project and pay bills, but Roberts refused to do so. (Cromwell Dep., pp. 23, 24; Bennett Dep., pp. 55, 56.)

Subsequent to the execution of the Amarillo bonds, American had provided other surety bonds for these joint venturers and other parties for a Capehart housing project for the Department of the Navy at Whidbey Island, Washington, and this job was also under construction. Upon Roberts' refusal to proceed in any respect under his indemnity agreement on the Amarillo matter, American obtained agreements for the joint control of the Amarillo project and the Whidbey Island project. (Plaintiff's Exhibit 7; Defendants' Exhibit 8.) Pursuant to the joint control agreement, American then provided the moneys necessary for the joint venturers to pay the bills and complete the Amarillo project. (Tr., p. 72.) The sum of money provided by American has been admitted to be the sum set forth in the pre-trial order (Tr., pp. 60-

61, 74), $1,049,218.63, and was the sum for which judgment was sought against the Roberts. Plaintiff did not "take over the job" but financed it to completion under the original contracts.

On or about October 10, 1959, American Casualty entered into a pledge agreement with K. H. Vitt, Catherine Vitt and the Vitt Construction Company, Inc., whereby the Vitts and Vitt Construction Company, Inc. pledged assets of a value agreed to be $350,000.00 to American Casualty. (Tr., p. 73.)

By the terms of the agreement, the Vitts specifically provided that the assets were to be applied first against any losses arising at Whidbey, sustained by American Casualty, and thereafter to any losses sustained in connection with the Amarillo housing project. (Exhibit 9, p. 2.)

This pledge of assets was made at approximately the same time that American Casualty entered into the joint control agreements for Whidbey Island project and the Amarillo project. (Tr., p. 73.)

The joint control agreement with Vitts' pledge agreement were submitted to Roberts' attorneys, J. F. Cromwell and E. H. Anderson, who approved the joint control agreements but made reservations as to the pledge agreement. (Cromwell Dep., p. 25; Bennett Dep., pp. 57, 58; Defendants' Exhibit 10.)

Roberts took no part and evidenced no interest in the Amarillo project except to see that his compensation was fully paid, apparently as per the schedule

set forth in the indemnity agreement, final payments having become due after his refusal to perform under the indemnity agreement. American proceeded to provide finance for said joint venture under the joint control agreement to permit completion of the Amarillo project and was subsequently called upon to provide funds for the Whidbey Island project, which sustained losses in excess of $600,000.00. (Bennett Dep., p. 59.)

Having become liable for and having sustained losses pursuant to the bonds upon which it was indemnified by the defendants, American thereupon brought this action on the 1st day of April, 1960, to seek relief as provided in such indemnity agreement.

In order to avoid the long and protracted trial which would have been necessary for identification of the many invoices, vouchers and drafts involved in the completion of the project and payments of the bills of indebtedness, counsel for both parties stipulated the amount which American necessarily and reasonably expended in the performance of its obligations under such surety bonds, to-wit: $1,049,218.63.

The trial Court determined that the Idaho First National Bank, N.A., as executor of the estate of V. A. Roberts, was indebted to American Casualty in the amount of $1,049,218.63, but that defendant was entitled to have the Vitt pledged assets valued at $350,000.00 set off against this indebtedness, as well as the value of certain construction equipment, amounting to $30,000.00.

American Casualty has not appealed the $30,000.00 setoff, but contends, and one of the questions on this appeal is whether the Court erred in allowing a setoff against the obligations of Roberts of the value of the assets the Vitt and Vitt Construction Company, Inc. pledged to American when such pledge specifically directed that such assets should be applied first to the losses at Whidbey and thereafter the losses at Amarillo.

The trial Court, while finding that defendants Roberts were indebted to American Casualty by virtue of their indemnity agreement in the amount of $669,-218.63, determined that interest on such amount should be computed only from the date of judgment, instead of from the date when such amount was due under the indemnity agreement. (Tr., pp. 76-77.) The question presented is whether, under Idaho law, interest should be computed on the amount found due American Casualty by virtue of the indemnity agreement, from the date when such amounts became due, no later than when complaint was filed, rather than from the date when judgment was entered.

SPECIFICATIONS OF ERRORS

1. The Court erred, as a matter of law, in failing to award plaintiffs-appellants interest on the amount due from defendant-respondent, Idaho First National Bank, N. A., executor of the estate of V. A. Roberts, deceased, from the date and time the same became

due, being not later than the filing of the complaint in this action.

2. The Court erred in concluding, as a matter of law (Conclusion of Law III, Tr., pp. 76, 77), that the date of judgment is the date for the commencement of the accrual of interest in this action for the reason that applicable law establishes that interest was due from the time suit was commenced.

3. The Court erred in concluding, as a matter of law (Conclusion of Law II, Tr., p. 76), that the assets of K. H. Vitt, Catherine Vitt, and Vitt Construction Company, Inc., pledged to American Casualty Company against losses at the Whidbey Island project were applicable to losses sustained at Amarillo and were proper matters of setoff against the amount found owing by defendant-respondents, for the reason that by the law the terms of the pledge agreement control the application of the pledged securities.

4. The Court erred in concluding, as a matter of law (Conclusion of Law II, Tr., p. 76), that plaintiff had a duty to marshal the assets of the principals on said bonds for the benefit of defendant Idaho First National Bank, N. A., as executor of the estate of V. A. Roberts, and Ellen M. Roberts, for the reason that, as a matter of law and the evidence in this case, such doctrine is totally inapplicable to the pledged securities.

5. The Court erred in entering Conclusion of Law III (Tr. pp. 76-77), and crediting as a setoff against the amount owed plaintiffs-appellants by defendant-

respondent, Idaho First National Bank, N. A., executor of the estate of V. A. Roberts, the amount of $350,000.00, and thereby finding that the amount due under and by reason of the indemnity agreement (Exhibit 1) was $669,218.63, for the reason that the correct amount is, pursuant to the evidence and the law, $1,019,218.63, together with interest thereon at 6% per annum from the date the same became due, being no later than the date of filing complaint against defendant.

ARGUMENT

INTEREST IS ALLOWED AT A RATE OF SIX PER CENT ON MONEY DUE ON EXPRESS CONTRACT FROM DATE MONEY BECOMES DUE, WHETHER THE SUM IS LIQUIDATED OR UNLIQUIDATED BY IDAHO STATUTES—COURT ERRED IN NOT ALLOWING APPELLANTS INTEREST FROM TIME MONEY BECAME DUE.

The trial Court allowed the plaintiff interest on the amount of the judgment only from the date of the judgment. (Tr. p. 77, Conclusion of Law No. IV; Tr. p. 93.) This finding is contrary to the laws of the State of Idaho governing the allowance of interest under the class of cases in which this case falls.

The trial Court should have applied the statutes and law of the State of Idaho in allowing interest on the sums due appellants. *Illinois Surety Co. v. John Davis Co.,* 244 U.S. 376, 37 S.Ct. 614, 617, 61 L.ed. 1206; *U. S. v. Mittry Bros. Construction Co.* (D.Ct. Idaho, 1933), 4 F.Supp. 216, 219, affm. 75 F.2d 79.

Section 27-1904, Idaho Code, provides the terms and times when interest may be allowed. This statute provides:

"27-1904. Legal rate of interest.—When there is no express contract in writing fixing a different rate of interest, interest is allowed at the rate of six cents on the hundred by the year on:

1. *Money due by express contract.*

2. *Money after the same becomes due.*

3. Money lent.

4. Money due on the judgment of any competent court or tribunal.

5. Money received to the use of another and retained beyond a reasonable time without the owner's consent, express or implied.

6. Money due on the settlement of mutual accounts from the date the balance is ascertained.

7. Money due upon open accounts after three months from the date of the last item." (Italics ours.)

The monies due and payable appellants by respondents became expressly due under the terms and provisions of the contract of indemnity between the parties. This agreement was drafted and prepared by respondents' attorney, and any ambiguity or uncertainty should be construed against respondents, if any there be. (Dep. J. F. Cromwell, pp. 3-8.) The applicable provision of this contract provided:

"The third parties [Roberts] hereby undertake and agree to indemnify at all times and keep indemnified the second party [American Casualty], and hold and save second party harmless from and against any and all damages, loss, costs, charges and expenses of whatsoever kind or nature, including counsel fees and attorneys' fees, which the second party shall or may at any time

sustain or incur by reason or in consequence of having executed said bonds, or any of said bonds; *and the third parties* [*Roberts*] *will pay over,* reimburse and make good to the second party [American Casualty] *all sums or amounts of money which the second party or its representatives shall pay or cause to be paid, or become liable to pay,* on account of the execution of such bonds, or either of such bonds, and on account of any damages, costs, charges, and expenses of whatsoever kind or nature, including counsel and attorneys' fees which the second party may pay, or become liable to pay by reason of the execution of such bonds, or either of such bonds, or in connection with any litigation, investigation or other matters connected therewith, such payment to be made to the second party [American Casualty] as soon as it shall have become liable therefor, whether the second party shall have paid out said sum or any part thereof or not. . . ." (Exhibit 1, pp. 4-5. Italics added.)

Respondents' attorney further specifically provided in the contract the time when liability accrued to respondents and when payment was to have been made, stating:

> "Such payment to be made to the second party [American Casualty] as soon as it shall have become liable therefor, whether the second party shall have paid out said sum or any part thereof or not." (Exhibit 1, p. 5.)

Under the terms of its bond, American Casualty Company became liable to the obligee for completion of the project and payment of claims for labor and

materials when the principals became unable to complete the project and notified appellants of such fact in September, 1959. (Pre-Trial Order, Para. 3(j), Tr. pp. 36-37.) Appellants immediately notified Respondent Roberts of the inability of the principals to perform the contract by registered letter to V. A. Roberts and Ellen M. Roberts (Pre-Trial Order, Para. 3(k), Tr. p. 37; Exhibits 5 and 6.) The liability of appellants was created at that time, as was the liability of respondents under the terms of the contract of indemnity. Respondents knew of the potential loss by reason of the investigation made by their engineer and their attorney, whom they sent to ascertain such fact at Amarillo, Texas, having been advised by their engineer of a probable loss of approximately $1,000,000.00. (Rep. Paul Wise, pp. 4-5.)

Upon respondent's refusal to complete the project and perform the obligations of the indemnitee, appellants proceeded to perform the obligations of the bond by completion of the project and payment of labor and materials. As these items were paid and expenses incurred, the amount of loss was at all times readily ascertainable by mere computation, and, in fact, the total amount that was necessarily and reasonably expended by American in the performance of its obligations was stipulated by the parties in the amount of $1,049,218.63. (Tr. p. 60.) This stipulation was entered into by the parties to avoid the long tedious identification of the very many vouchers, claims and items composing these expenditures, but the amount of the loss was at all times, after said money

had been expended, readily ascertainable, and under the terms of the indemnity agreement, payment was to be made by respondents to appellants as soon as appellants became liable therefor, whether appellants had paid said monies or not. (Exhibit 1, p. 5.)

The Idaho statute allowing interest on monies due has been uniformly construed by the Supreme Court of Idaho to require an award of interest to the party to whom the money was due, computed from the time that it became due. *Hendrix v. Gold Ridge Mines, Inc.,* 56 Idaho 326, 54 P.2d 254, involved the foreclosure of mechanics' liens. There were certain open accounts offset against the amount due under the liens and it was contended that lienholders' claims should not draw interest until after judgment. The Supreme Court of Idaho stated:

> "Sec. 26-1904, supra, [Sec. 27-1904, I.C.] makes no classification of 'liquidated' or 'unliquidated' claims as such. (Donley v. Bailey, 48 Colo. 373, 110 Pac. 65; Trimble v. Kansas City P. & G.R. Co., 180 Mo. 574, 79 S.W. 678, 1 Ann. Cas. 363.) It is dealing with the subject of money due on contracts, either express or implied, and applies as well to unsettled and disputed accounts as to those where the specific sum due is fixed and determined. The only condition is that it shall be a claim arising on a contract express or implied. In such cases the sum due is capable of being made certain by some measure or standard of the contract, whether express or implied."

The present case falls squarely within the class of cases referred to above by the Idaho Court.

Subsequent to the *Hendrix* case, the Court again had the question of allowance of interest before it in *Guyman v. Anderson,* 75 Idaho 294, 271 P.2d 1020, wherein the Court stated the law to be (p. 296, Idaho Reports):

> "This leaves the question of interest. As stated in Hendrix v. Gold Ridge Mines, Inc., 56 Idaho 326; 54 P.2d 254, the statute, Sec. 27-1904, I.C., providing for interest in the absence of express contract, makes no distinction between liquidated and unliquidated claims, and applies to money due on contracts whether express or implied. The general rule is that interest will be allowed even though the claim is unliquidated 'where the amount due can be readily ascertainable by mere computation, or by a legal or recognized standard.' 47 C.J.S., Interest, Sec. 19 b. Here the dispute between the parties involved the rate of pay itself. There was no agreement as to what the rate would be. However, there is some evidence that $10 per hour is a reasonable charge for leveling land with the equipment used by plaintiff, and that such a rate was charged by others. Although scant, this furnishes some proof of a recognized standard for the determination of the amount due. The above rule is, therefore, applicable here and interest at the legal rate should have been allowed from the date the work was completed, to wit: March 23, 1953. State v. Title Guaranty & Surety Co., 27 Idaho 752, 152 P. 189; Donaldson v. Josephson, 71 Idaho 207, 228 P.2d 941; Yarno v. Hedlund Box & Lbr. Co., 135 Wash. 406, 237 P. 1002; Perry v. Magneson, 207 Cal. 617, 279 P. 650; Union Sugar Co. v.

Hollister Estate Co., 3 Cal. 2d 740, 47 P.2d 273; Johnson v. Hanover Fire Ins. Co., 59 Wyo. 120, 137 P.2d 615; Public Market Co. of Portland v. City of Portland, 171 Or. 522, 130 P.2d 624, 138 P.2d 916; U.S. for Use and Benefit of Belmont v. Mittry Bros. Const. Co., D.C., 4 F.Supp. 216."

This staute was further construed by the District Court of Idaho in *U. S. v. Mittry Bros. Const. Co.,* 4 F.Supp. 216, affm. 75 Idaho 79, which case involved claims against the principal and surety for labor and materials arising out of a subcontract. The surety contended that inasmuch as the amount due under the claims was not definite until determined by the Court, interest should not be allowed until after judgment. The matter was carefully considered by Judge Cavanah, United States District Judge, who first ascertained that the law of Idaho controlled even though the suit involved a federal bond under federal law, and then determined that the Idaho statute and cases construing it, required a judgment allowing interest to the claimant upon monies from the time that it was due even though the amounts were in dispute. The Court found that it was difficult to ascertain the exact date upon which the sums became due, and, therefore, held that the latest date upon which interest would have commenced would be the date upon which the complaint was filed. Appellants here contend that although the liability accrued on the part of respondents prior to payment, the latest date when interest would commence to accrue under the Idaho

law would be the time of commencement of suit, to wit: April 1, 1960.

The computation of amounts paid or general liability were readily ascertainable at any time during the completion of this project and payment of claims by mathematical computation, and certainly would not have been nearly as complicated as the problem of determining the reasonable value of services rendered, etc., as was the situation before the Idaho Supreme Court in the cases cited above.

Other Idaho cases have construed the statute as clearly allowing interest on monies in dispute from the time it became due; *Intermountain Association of Credit Men v. Milwaukee Mechanic's Insurance Co.,* 44 Idaho 491, 258 P. 362 (allowing interest sixty days after submission of proof of loss where amounts due, values of property lost, etc., were in issue). *State v. Title Guaranty Co.,* 27 Idaho 752, 152 P. 189 (suit against surety of Bank Commissioner by depositors of bank surety contending its liability had not accrued until determination of amounts due, but judgment allowed interest from date of closing of bank).

Roberts was a paid indemnitor and falls in the same status and under the same obligation as a compensated surety. Respondents' obligations, under the terms of the agreement prepared and executed by them, made their liability and obligation to pay at least co-existent at the time that appellants' liability accrued and payments were made. Of course, the completion and settlement of accounts arising through the inability of the principal to perform its contract took

place over a considerable period, and while it would be mathematically possible to set forth the amount for which appellants were liable or had made payment on any given date by computing the accounts to that date, this, it is admitted, would have been cumbersome, as it was in the *Mittry Bros.* case (supra), and appellants are not insisting upon this minute computation, but are insisting that, as was found by Judge Cavanah in *Mittry Bros.,* the very latest date upon which they would be allowed interest was the commencement of suit, to wit: April 1, 1960.

The Idaho statute and rule is equally applicable to amounts due the indemnitee on a contract of indemnity. Monies are due under these contracts, as specifically provided in this contract, when liability accrues, and in any event, no later than the time when the indemnitee pays the sum for which he is entitled to reimbursement from the indemnitor. *National Bank of Tacoma v. Aetna Casualty & Surety Co.,* 296 P. 831, 161 Wash. 239 (1931); *Kessling v. Frazier,* 119 Ind. 185, 21 N.E. 552; *Prudential Insurance Co. v. Goldsmith,* 192 S.W.2d 1 (repayment of life insurance paid on presumptive death of missing insured absent seven years, interest being allowable under an indemnity agreement executed by the beneficiaries to whom payment had been made from date of discovery that insured was alive.

Under statute similar to the Idaho statute, New York has applied the rule in cases involving indemnity of action tortfeasor by passive tortfeasor on the doctrine of implied indemnity contract, holding that

the plaintiff indemnitee under such contract is entitled to interest from the time indemnitee paid the third party. *Employers Liability Assurance Corp. v. Empire City Iron Works,* 187 N. Y. Supp.2d 425.

To the same effect are *Whetmore v. Green,* 28 Mass. 462; *Panama Canal Co. v. Stockard & Co.,* 137 Atl. 2d 793.

As a matter of law, the appellants are entitled to interest upon such sums as the Court found due appellants from the time the same became due, and certainly no later than the commencement of the suit.

We submit that the finding allowing interest only from time of judgment was in error and that the judgment providing for interest only from the date of judgment is in error and that the judgment should be reversed with directions to the lower Court to allow interest to appellants at the rate of six per cent per annum from April 1, 1960, in accordance with the laws of the State of Idaho.

PLEDGE AGREEMENTS MUST BE ENFORCED AS WRITTEN AND ASSETS PLEDGED TO SECURE ONE OBLIGATION AT THE DIRECTION OF A PLEDGOR MAY NOT BE APPLIED AGAINST A DIFFERENT OBLIGATION.

K. H. Vitt, Catherine Vitt, and Vitt Construction Company, Inc. executed a written pledge agreement (Exhibit 9) pledging assets valued at $350,000.00 to American Casualty on the express and unequivocal condition that such assets must first be applied to losses on the Whidbey Island project and thereafter to losses on the Amarillo project. The clause read:

> "It is understood and agreed that the net proceeds received from any sale of any part or all of the collateral pledged hereunder will be applied first to reimburse surety for any loss attributable to the Department of the Navy project [Whidbey Island], and the balance, if any, shall be applied to reimburse surety for any such loss sustained in connection with the Amarillo Housing Project." (Exhibit 9, p. 2, para. 3.)

American Casualty's losses at Whidbey Island were over $600,000.00 (Bennett Dep., p. 59), and American is entitled to recover this loss from the Vitts and Vitt Construction Company, Inc., as principals on the Whidbey bonds. The Vitt pledge agreement clearly directs that the Vitt assets be applied against these losses at Whidbey, and the Vitts and Vitt Construction Company, Inc. are entitled to have their Whidbey obligations to American reduced to that extent, because the law, as set out below, clearly establishes that a pledgee may not apply pledged securities to any obligation other than the one specifically designated by the pledgor.

The trial Court completely disregarded the unambiguous terms of the pledge agreement and applied the Vitt pledge to the obligation of Roberts allowing the Roberts a setoff in the amount of $350,000.00 against obligations otherwise due American Casualty from the Roberts amounting to $1,049,218.63.

The Vitt pledge agreement was entered into and signed in Washington and the laws of that State control all questions relative to the agreement.

Whitman v. Green, 289 F.2d 566 (9th Cir. 1961); *Roberts v. Underwriters at Lloyds London,* 195 F. Supp. 168, 172 (DC Idaho 1961).

Cases uniformly hold that Courts must give effect to contracts as they are written and that Courts are not free to disregard terms of contracts, or to rewrite or in any way alter a contract voluntarily entered into by the parties. Washington Courts have so held many times.

In *Collins v. Northwest Casualty Co.,* 180 Wash. 347, 39 P.2d 986 (1935), the Court stated:

> "We are not permitted, upon general considerations of abstract justice, or in the application of the rule of liberal construction, to make a contract for the parties that they did not make themselves, or to impose upon one party to a contract an obligation not assumed."

The Washington Supreme Court stated in *Bernard v. Triangle Music Co.,* 1 Wash.2d 41, 95 P.2d 43 (1939):

> "We agree with respondents, at least to this extent, that this is an action to enforce a written contract, and, in the absence of a showing of fraud or other infirmity in its inception, the court must enforce it as written; that *the court cannot disregard or suppress any of its terms;* and, of course, by the same token, it cannot read anything into the instrument which is not already there." (Italics supplied.)

See also, e.g., *Trinity Universal Ins. Co. v. Willrich,* 3 Wash.2d 263, 124 P.2d 950 (1942); *Durant*

v. Snyder, 65 Idaho 678, 688, 151 P.2d 776 (1944); *Toysum v. Toysum,* 82 Idaho 58, 63, 349 P.2d 556 (1960); *Hello World Broadcasting Co. v. International Broadcasting Corp.,* 186 La. 589, 173 S. 115 (1937).

Pledge agreements are no exception and are to be enforced according to their terms, *Swartz v. Avery,* 113 Vermont 175, 31 Atl.2d 916 (1943).

The trial Court erred in refusing to give effect to the pledge contract as written and, in effect, substituted a different contract in its place by applying the pledged assets to Amarillo instead of Whidbey Island, as directed by pledgors in their agreement.

Assets specifically pledged by the pledgor to secure a specific obligation may not be applied against a different obligation. The Eighth Circuit Court of Appeals so held in *State of Arkansas v. Pufakl,* 52 F.2d 116, 118 (1931). The Court stated:

> "Where securities are pledged to secure the payment of a particular loan or debt, the creditor cannot hold such collateral to secure the payment of any other claim or indebtedness than the one for which they were specifically pledged."

See also *Progressive Builders v. Florida Wide Developers,* 142 So.2d 122 (Fla. App. 1962).

The manner in which the Vitt assets were to be applied is controlled by the direction Vitt gave in the pledge agreement:

> "The determination of the legal effect of the pledge is controlled by the intention of the par-

> ties. . . . It will not be extended to a debt or obligation other than that intended by the pledgor." *Parron v. First National Bank,* 289 Mich. 629, 286 N.W. 859, 860, 861 (1939).

The assets have been placed in American Casualty's hand and it is American Casualty's obligation to apply such assets as directed by the pledgors Vitt and Vitt Construction Company, Inc. In *People v. Klinger,* 164 Misc. 530, 300 N.Y. Supp. 408, 417, it is stated:

> "The pledgee cannot lawfully retain the property to secure a debt distinct from that which it was pledged. 49 C.J. 972. See Romero v. Newman, 50 La.Ann. 80, 23 So. 493."

This Ninth Circuit Court, applying Washington law, which is controlling, held that where a receipt specified the obligation which assets are pledged to secure, that receipt is controlling and the assets may not be applied against different obligations. *First National Bank of Kelso, Wash. v. Gruver,* 77 F.2d 144 (1935).

The common law on this matter is summarized at 68 A.L.R., beginning at page 912, citing numerous holdings, as follows:

> "The right of the owner of collateral to direct its application must be expressed at the time the pledge is made, either by an express direction or by a reservation of future right of direction. In the absence of such express direction or reservation of right thereto by the owner, the pledgee may apply the collateral to any debt within the

> pledge that he may deem most precarious, or as his judgment may dictate. Slaughter v. Texas Life Ins. Co. (1920); Tex.Civ.App.) 218 S.W. 1109.
>
> "But, if collateral is pledged for the security of a particular, specified debt, the pledgee has no lien on the collateral pledged for any other or subsequent debt contracted by the pledgor to him, without an agreement to that effect, either express, or implied from the nature or circumstances of the transaction."

There is no evidence in this record to demonstrate that the pledge agreement executed by Vitt Construction Company, Inc., and Mr. and Mrs. Vitt, directing that the pledged security be applied first to Whidbey losses and then to Amarillo losses, was anything other than a completely voluntary act on the part of the Vitts. Such application would have been to the benefit of the Vitt Construction Company, Inc., as it was in no way concerned or liable for the Amarillo losses. There was no fraud or collusion between the Vitts and American Casualty, and none has been alleged by defendant.

The Vitt Construction Company, Inc. is not a party to this action, and jurisdiction was never obtained over the Vitts. The Court's application of the assets contrary to the express terms of the Vitt agreement is not binding upon them. The Court's disregard of the agreement places American in an untenable position. The Court caused the pledged securities to be set off against losses at Amarillo, thus giving Roberts credit which the Vitts are entitled to. American

would be forced to apply the pledged security against Whidbey by the terms of the Vitt agreement. Appellants are thus faced with the necessity of a double application of the pledged securities, once to Roberts by judgment of the Court, and again to Vitt by the terms of the pledge agreement, which agreement was not and could not be reformed in this action by the Court.

The Vitt pledge agreement is a binding agreement that controls the application of the security to the Whidbey losses. The trial judge erred in refusing to give effect to this agreement as written, and consequently, the conclusion of law allowing a setoff of the Vitt pledged security against losses at Amarillo for amounts otherwise due American Casualty from the Roberts should be reversed.

THE EQUITABLE DOCTRINE OF "MARSHALLING ASSETS" IS COMPLETELY INAPPLICABLE TO THE CASE AT BAR.

The trial Court below could not have had the equitable doctrine of marshalling assets in mind when it concluded as a matter of law (Tr., p. 76) "That it was the duty of plaintiffs to marshal the assets of the principals on said bond" for the benefit of Roberts, for the reason that very basic elements necessary to call such doctrine into effect are completely lacking from this case.

The essence of the equitable doctrine of marshalling assets is that when two creditors, i.e., American Casualty and Roberts, are creditors of a single debtor,

i.e., Vitt, and where one creditor is secured by only one fund of assets of the debtor and the other creditor is secured by two funds of assets of the common debtor, the doubly secured senior creditor will be required to satisfy his debts, first out of the funds which are unavailable to the junior creditor, and then out of the fund available to both creditors, so that in the end, assets, if possible, will remain to satisfy the junior creditor's debt.

This general statement of the doctrine is set out at 35 Am. Jur., Marshalling Assets and Securities, Sec. 2, pp. 385-386:

> "Where two or more creditors seek satisfaction out of the assets of their debtor, and one of them can resort to two funds whereas another creditor has recourse to only one fund—for example, where a senior or prior mortgagee has a lien on two parcels of land, and a junior mortgagee has a lien on but one of the parcels—the former may be required to seek satisfaction out of the fund which the latter creditor cannot touch, in order that the latter may, if possible, have his claim satisfied out of the fund which is subject to the claims of both creditors. This mode of procedure is termed 'marshalling assets'. Generally speaking, the doctrine of marshalling requires the assets to be applied so as to protect a creditor who has a lien only on only a part thereof."

See, e.g. *In Re Careful Laundry, Inc. v. Pantex Mfg. Corp.,* 104 A.2d 813 (Md., 1954).

The burden of showing the existence of all conditions calling for marshalling is upon the one who

seeks to be benefited by the doctrine, the Roberts in this case. *Johnson v. Wilson,* 145 Wash. 515, 261 Pac. 102 (1927).

An absolutely vital and essential prerequisite to the applicability of the doctrine is that there be in existence two funds of assets available to one of the creditors. *Muskogee Industrial Financial Corp. v. Perkins,* 361 P.2d 1065 (Okla., 1961); *In Re Concordia Mercantile Co.,* 173 Kan. 155, 244 P.2d 1175 (1952); *Mead v. City National Bank of Clinton,* 232 Iowa 1276, 8 N.W.2d 417 (1943); 55 *C.J.S.,* Marshalling Assets and Securities, Sec. 8, p. 968.

In the case at bar there is only one fund of assets in dispute—mainly the Vitt securities. There is no other fund of assets to which American Casualty can resort to satisfy its Whidbey losses, before resorting to the Vitt assets. The existence of only one fund of security makes the principle of marshalling assets totally inapplicable.

Furthermore, the doctrine is an equitable doctrine and a prerequisite to its application is the requirement that the debtor who is secured by two funds, and whose security is paramount to the junior creditor be made completely whole. The doctrine merely sets forth the manner in which the paramount creditor is to be made whole, mainly that the creditor must resort to funds unavailable to the junior creditor first, thus leaving assets against which both creditors have liens, available to satisfy the junior creditor's debt, if any such assets remain after the primary creditor has been made whole.

At 55 *C.J.S.,* Marshalling Assets and Securities, Sec. 4, pp. 962-963, it is stated:

> "The doctrine of marshaling applies only when it can be applied with justice to the paramount, or doubly secured, creditor, and without prejudicing or injuring him, or trenching on his rights. Such relief will not be given if it will hinder or impose hardships on the paramount creditor, or inconvenience him in the collection of his debt, or deprive him of his rights under his contract, by displacing or impairing a prior acquired lien or contract right; *nor will it be given on any other terms than giving him complete satisfaction.*" (Emphasis added.)

In *Philadelphia Home, etc., v. Philadelphia Savings Fund Society,* 126 N.J.Eq. 104, 8 A.2d 193, 198 (1939), it was stated:

> "One of the rules of this doctrine is that relief will not be given if it will prejudice the rights of the person against whom the doctrine is asserted, which is tantamount to holding that the doctrine will not be asserted unless it may be equitably asserted, in other words that relief will not be given if it will delay or inconvenience the paramount encumbrancer in the collection of his debt or prejudice him in any manner."

See also, *Mead v. City National Bank of Clinton,* 232 Iowa 1276, 8 N.W.2d 417 (1943).

The various rules pertaining to the doctrine of marshalling assets and securities are stated with many cases annotated at 135 *A.L.R.* 738. It is clear that this doctrine does not apply to the application of the Vitt pledge.

In the case at bar there is only one fund against which American Casualty can resort for satisfaction of its losses at Whidbey, but even the application to the Whidbey losses of all the Vitt assets which the Roberts want preserved and applied against their losses, will not make American Casualty whole. Losses to American Casualty at Whidbey presently exceed more than $600,000.00. (Bennett Dep., p. 59.)

If the Court in its reference to "marshalling of assets" referred only to the protection of salvage and the application of a credit for the equipment which the Court found worth $30,000.00 and which the Court credited to Roberts, it was a misuse of terms. Appellant has not appealed from that finding—but misused or not, neither the term nor the doctrine applies to this case in any way and does not justify the complete alteration of the Vitt agreement.

The Court erred in determining that there was a "duty" on the part of American Casualty to "marshal" the Vitt assets for the benefit of Roberts.

AMERICAN CASUALTY OWED THE ROBERTS NO DUTY TO PURSUE COLLATERAL ASSETS FOR THE ROBERTS' BENEFITS ONCE THE ROBERTS' LIABILITY UPON THE INDEMNITY CONTRACT BECAME FIXED WHEN THE CONTRACTORS DEFAULTED ON THE BONDS. IT WAS THE ROBERTS' OBLIGATION TO PURSUE SUCH SECURITY AND REDUCE THEIR LOSSES THEMSELVES, IF THEY SO DESIRED.

Once American Casualty became liable for losses at Amarillo, they immediately became entitled to be saved harmless from the consequences of such liability by the Roberts. By the terms of the indemnity agreement, it was not necessary for American Casualty to pay all claims arising out of the contractors' default at Amarillo. The Roberts' obligation on the indemnity contract arose and became fixed once American Casualty became liable, whether or not American Casualty had made payments. (See Exhibit 1, page 5.)

American Casualty's liability on the bonds accrued upon the contractors' default in September, 1959, and most claims had been paid when suit was filed against the Roberts April 1, 1960. The Roberts' obligation on the indemnity agreement matured at least by that time and their obligation to pay American Casualty became fixed.

Roberts refused to pay or save American harmless when demand was made upon them September 24, 1959, and many times thereafter. The Roberts breached their indemnity agreement as early as September 24, 1959, and thereafter, American, as a matter of law, was under no duty to attempt to secure collateral assets and reduce the Roberts' obligation to American, which the Roberts at all times refused to pay.

The great weight of authority makes it absolutely clear that the indemnitee, American Casualty, was under no duty to reduce the Roberts' losses by pursuing collateral assets for the benefit of the indemnitor, Roberts, once their liability on the indemnity agreement became fixed. It was the Roberts' duty to look after their own interests.

Fidelity & Deposit Company of Maryland v. O'Brien, 222 S.W. 645 (Ky., 1918), was a suit by a surety on a sheriff's bond against surety's indemnitor. The Court held the indemnitee (surety company) was not required to bring suit and reduce the indemnitor's liability, once the indemnitor was liable upon the agreement. The Court stated:

> "(Surety) was not required to resort to any remedies it might have against [sheriff] Blackwell or other persons through him. When it satisfied the judgments it had the right to proceed at once against the indemnitors on their undertaking to save it from loss. . . . In other words, when the indemnitee is sought to be made liable on his undertaking, he must not, by his laches or negligence, put upon the indemnitors a burden they would not otherwise be compelled to bear, but this duty does not go to the extent of obliging the indemnitee to bring suit against his principal or third parties to protect the indemnitors or to take any steps to recover from his principal or third parties the funds for which it has become liable on his undertaking. *It is the business of the indemnitor to resort, for their own protection, to remedies like these if they desire to do so.*" (Emphasis added.)

See also *Fidelity National Bank v. Fox,* 258 P. 355 (Wash.), 1927; LRA 1918E., page 575.

An indemnitee may even abandon security furnished without consequence to his rights as against the indemnitor. *New Amsterdam Casualty Co. v. Frazier,* 252 P. 703 (Wash. 1927).

American Casualty was entitled to recover from the Roberts for all liability and loss sustained on the performance and payment bond covering the Amarillo project. American Casualty was not obligated in any way to pursue collateral assets for the benefit of the Roberts. Once the Roberts' liability on the indemnity contract became fixed, it was their own obligation to look out for themselves.

K. H. Vitt and Vitt Construction Company, Inc. had an absolute right to determine the obligation against which their assets were to be applied. American Casualty was in no way impaired from accepting the pledge to be applied first against the losses at Whidbey, because American Casualty owed the Roberts no duty to secure collateral assets and reduce the Roberts' losses at Amarillo. The Roberts had ample opportunity to obtain this security for themselves. They failed to do so and, in fact, failed to do anything whatever to reduce the loss at Amarillo or to save American Casualty harmless from loss. Trial Court erred, as a matter of law, in allowing a setoff of the amount of the pledged securities against amounts otherwise due American and General Reinsurance.

CONCLUSION

We respectfully submit to the Court that the Court erred in not allowing interest on the amounts found due from defendant from the time the same became due and not later, in the absence of evidence of exact date, than the time of filing the Complaint.

We further submit that under the law the Court was without authority to change the terms and conditions of the pledge made by Vitt Construction Company, Inc. and Mr. and Mrs. Vitt of their shares of stock in the Vitt Construction Company, Inc., and the sum found due by the defendant to the plaintiff should be increased to the extent of the agreed value of such pledged securities, to-wit: $350,000.00.

We therefore submit to the Court that this Court should return this action to the District Court with instructions to enter judgment for the sum of $1,019,-218.63 and to allow plaintiff interest on the sum from April 1, 1960, together with attorneys' fees in the sum of $15,000.00.

Dated, Boise, Idaho,
August 15, 1963.

Respectfully submitted,
WILLIS C. MOFFATT of
MOFFATT, THOMAS, BARRETT & BLANTON,
Attorneys for Appellants.

Certificate

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Willis C. Moffatt,
Attorney for Appellants.

(Appendix Follows)

Appendix.

Appendix

TABLE OF EXHIBITS

Exhibit	Identified Pages	Offered Pages	Accepted Pages
Plaintiffs' Exhibit 1, Indemnity agreement, together with all exhibits attached thereto, and numbered A, B, C, D, E, F	31, 36	31, 39	39-40, 68, 69
Plaintiffs' Exhibit 2(a), performance and payment bonds—AIR 3	34	34	39-40, 68
Plaintiffs' Exhibit 2(b), performance and payment bonds—AIR 4	34	34	39-40, 68
Plaintiffs' Exhibit 2(c), performance and payment bonds—AIR 5	34	34	39-40, 68
Defendants' Exhibit 3, letter, Roberts to American Casualty, dated August 28, 1958	35	35	39-40, 69
Plaintiffs' Exhibit 4, Roberts financial statement	35	35	39-40, 69
Plaintiffs' Exhibit 5, letter, American Casualty to V. A. Roberts, dated September 24, 1959	37	37	39-40, 72
Plaintiffs' Exhibit 6, letter, American Casualty to Mrs. V. A. Roberts, dated September 24, 1959	37	37	39-40, 72
Plaintiffs' Exhibit 7, Amarillo joint control agreement	38	38	39-40, 73
Defendants' Exhibit 8, Whidbey Island joint control agreement	38	38	39-40, 73
Defendants' Exhibit 9, Vitt pledge agreement	39	39	39-40, 73
Defendants' Exhibit 10, letter of Eugene Anderson, dated October 14, 1959	39	39	39-40, 74

No. 18,675

United States Court of Appeals

For the Ninth Circuit

American Casualty Company of Reading, Pennsylvania, and General Reinsurance Corporation,

Appellants,

vs.

Idaho First National Bank, Executor of the Estate of V. A. Roberts, Deceased, and Ellen M. Roberts,

Appellees.

APPELLEES' BRIEF

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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APPELLEES' BRIEF

STATEMENT RE JURISDICTION
(Rule 18(b) 9th Cir.)

Pleadings and admissions in this case, as established by Pre-Trial Order, establish jurisdiction in the United States District Court for the District of Idaho, Southern Division, pursuant to 28 U.S.C.A. 1322 (Tr. pages 4-5, 30-32), as follows:

A. Diversity of Citizenship.

Plaintiffs: American Casualty Company organized and having its principal place of business in the State of Pennsylvania.

General Reinsurance Corporation, organized and having its principal place of business in the State of New York.

Defendants: V. A. Roberts, citizen of the State of Idaho.

Ellen M. Roberts, citizen of the State of Idaho.

V. O. Stringfellow, citizen of the State of Washington, filing general appearance in this action.

Burl A. Johnson, citizen of the State of Oklahoma, filing general appearance in this action.

Darleen M. Johnson, citizen of the State of Oklahoma, filing general appearance in this action.

B. Amount in controversy, exclusive of interest and costs, exceeds $10,000.00.

Service was not made upon named defendants, K. H. Vitt or Catherine Vitt and judgment has not been rendered against them.

C. Appeal.

This appeal is from final judgment of the United States District Court for the District of Idaho, Southern Division (Tr. pages 92-96), and is appealable pursuant to the provisions of 28 U.S.C.A. 1291.

STATEMENT OF THE CASE

Appellees feel that the factual recitation set forth in appellant's brief does not contain all of the important facts of the case or more particularly, those which obviously motivated the trial court in granting appellees substantial relief. They feel therefore, that a restatement of the case is in order. Parties will be referred to by their names.

On September 6, 1958, V. O. Stringfellow, K. H. Vitt and Burl A. Johnson entered into a written joint venture agreement for the purpose of submitting bid upon a Capehart housing project to be constructed for the United States Department of the Air Force at Amarillo Airforce Base, Amarillo, Texas (Tr. p. 34; Plfs. Ex. 1(A)). Pursuant to government specifications, the joint venturers sought bonding requirements from plaintiff American Casualty Company (Tr. p. 34), hereinafter referred to as American. American would not bond the joint venturers without indemnification from a third party and the joint venturers sought assistance in this regard from V. A. Roberts, a resident of Boise, Idaho, who had furnished similar indemnification for some of the joint venturers on previous projects (Tr. pp. 34-36). Normal fee for such indemnification was 1% of the contract price and for indemnification furnished in this instance defendant Roberts was subsequently so paid (Tr. p. 36; Plfs. Ex. 1).

In August of 1958 the joint venturers, in contemplation of the written agreement to be executed between them, had submitted a bid on the project. In

order for this bid to be considered, it was necessary they furnish the government a commitment on the bonding requirements and in turn, it was necessary that American have a commitment from Roberts on the indemnification. A letter (Defs. Ex. 3; Tr. p. 35), was furnished American by Roberts under date of August 28, 1958, wherein he advised American that upon receipt and verification of financial statements of the joint venturers and upon each of the joint venturers assigning their assets to him as collateral security he would indemnify American in the aggregate sum of $7,700,000.00 and would execute an indemnity agreement on terms identical to one previously executed on another (Fort Huachuca) housing project. This was merely a commitment letter to enable the contract to be signed and the project commenced (Cromwell Dep., pp. 32, 33). However, Roberts made it entirely clear that the joint venturers' assets would have to be available to him for his protection (Defs. Ex. 3), and his attorney, Fred Cromwell, also made it clear to one Baxter, American's agent (Cromwell Dep., p. 7), that these assets of the joint venturers would have to be available for Roberts' protection (Cromwell Dep., p. 33).

To satisfy Roberts that this would be so, American's agent, Baxter, procured from the joint venturers a telegram confirming this requirement on Roberts' part (Tr. p. 35; Cromwell Dep., pp. 33, 34). Roberts had refused to agree to the indemnification until he was assured of the security of the joint venturers' assets and upon receipt of the telegram felt the assets were

to be secured to him and on this understanding agreed to the indemnification (Cromwell Dep., pp. 34, 35, 42). American accepted his indemnification on this basis (Plfs. Ex. 1; Defs. Ex. 3). Roberts also submitted to American a financial statement (Plfs. Ex. 4) listing assets subject to his indemnity, all of which were the community assets of he and his wife.

Cromwell then prepared the indemnity agreement (Ex. 1 with attachments) and the agreement was executed by the joint venturers, Roberts et ux and American (Tr. p. 36). Its validity and execution are admitted. Attached to Exhibit 1, and a part thereof, are various other documents, most important of which are the bond applications and indemnifications executed by the joint venturers (Plfs. Ex. 1 (D,E,F)). All of the terms of the various bond applications are, by the terms of the indemnity agreement, deemed for the benefit and protection of defendants Roberts. Under paragraph 3 of the bond applications, as well as by the indemnity agreement itself, the joint venturers agree to indemnify against any and all liability, etc. and under section 15(a) further agree to post additional collateral security.

The indemnity agreement, Ex. 1, further provides, on page 6 thereof, that defendants Roberts are subrogated to all rights of American.

Following execution of Ex. 1, American, in the fall of 1958, issued the bonds required by the government and the joint venturers commenced construction of the housing project at Amarillo (Tr. pp. 35-36).

These same joint venturers thereafter, and while the Amarillo project was under construction, in June 1959, (Tr. p. 38) contracted to build a similar housing project for the government at Whidbey Island in the State of Washington. This project will hereinafter be referred to as Whidbey Island. American also executed the performance bonds for the joint venturers on Whidbey Island (Tr. p. 38). However, there was one important difference in this execution: On Whidbey Island, through some inadvertence within the company itself, American failed to obtain a third party indemnitor (Bennett Dep., p. 9; Cromwell Dep., pp. 19, 37) and in the course of subsequent events, American knew that if any losses could conceivably occur at Widbey Island they would be American's losses only, whereas American had defendants Roberts as indemnitors on Amarillo losses (Bennett Dep., p. 23).

On or about September 23, 1959, the joint venturers gave notice to American that they would be unable to complete the Amarillo project without financial assistance (Tr. p. 37). American, through its agent Bennett, notified defendants V. A. and Ellen Roberts of the anticipated default of the joint venturers (Plfs. Ex. 5 and 6). Bennett in his letter advised Roberts and his wife that the apparent loss on the Amarillo project would be between $600,000.00 and $700,000.00 and called upon Roberts and his wife to take whatever steps necessary, as indemnitors, to save American from loss or expense as the result of deficit operations (Plfs. Ex. 5 and 6).

Upon receipt of this notification from Bennett, Roberts requested his attorney, Cromwell, and an engineer, Paul Wise, to go to Amarillo and appraise the situation there existing. They met Bennett at Amarillo (Cromwell Dep., pp. 10-12; Bennett Dep., pp. 4-5; Wise Dep., pp. 3-4). Bennett was the agent of American (Bennett Dep., p. 4) and at all times had apparent authority to and did, then and thereafter, act for American (Wise Dep., p. 20; Cromwell Dep., p. 30; Bennett Dep., pp. 4, 23, 24).

The trip to Amarillo made by Wise and Cromwell was primarily a fact-finding trip (Cromwell Dep., p. 10). Cromwell and Wise returned to Boise and on October 4, 1959, met at the Roberts' home with Roberts, Bennett, and K. H. Vitt, one of the joint venturers (Cromwell Dep., pp. 15, 16; Bennett Dep., pp. 5, 6; Wise Dep., pp. 8-10). Roberts was in obvious poor health (Wise Dep., pp. 8, 9; Cromwell Dep., p. 23) and it was quite apparent to Bennett that Roberts was not physically capable of taking over the Amarillo project or personally seeing to its completion (Bennett Dep., p. 15; Wise Dep., p. 15). Roberts subsequently died November 12, 1961, and The Idaho First National Bank was substituted as a defendant herein.

It was quite apparent also that Roberts was not financially able to take over the project and that the bonding company would have to do so (Bennett Dep., pp. 14, 15, 28, 49, 50; Cromwell Dep., pp. 17, 18; Wise Dep., pp. 15, 16). On this specific premise Roberts and Bennett discussed the bonding company taking

over the job under a joint control agreement with the joint venturers (Cromwell Dep., p. 18; Wise Dep., p. 11; Bennett Dep., pp. 15, 18). The parties discussed the Amarillo situation generally, the losses, which were known at that time to exceed $600,000.00, and the probability of recouping these losses from anticipated profits on Whidbey Island plus application of assets of the joint venturers (Wise Dep., pp. 9, 10, 21; Cromwell Dep., pp. 20, 21, 22, 27, 28, 35, 36, 37, 38, 39 and 40; Bennett Dep., pp. 7, 10, 12). Bennett knew that American was in the Amarillo job to see to its completion and the only losses under discussion at the meeting were the losses on the Amarillo project (Bennett Dep., p. 16; Cromwell Dep., p. 21; Wise Dep., p. 22). All parties assumed, on Vitt's estimate, that Whidbey Island anticipated a profit which would go a long way to pay off the Amarillo losses (Wise Dep., pp. 11, 17 and 22; Cromwell Dep., pp. 19, 22, 35, 36; Bennett Dep., p. 10). Neither Bennett nor anyone else had any losses in mind other than Amarillo losses during all of the discussions pertaining to possible loses (Bennett Dep., pp. 16 and 17).

Roberts stated his understanding of the situation was that his liability would attach only to those losses which exceeded application of the Whidbey Island profits and the joint venturers' assets (Wise Dep., pp. 10, 11, 13, 17). Cromwell made it clear that the joint venturers' assets should be applied to the Amarillo losses before any liability accrued to Roberts and Bennett evidenced concurrence therein (Cromwell Dep., pp. 20, 21, 22, 27, 28; Wise Dep., p. 19). It was

the definite understanding and conclusion from the meeting that the assets of the joint venturers stood between Roberts and any loss at Amarillo and Bennett concurred in this understanding (Cromwell Dep., pp. 22, 35, 37, 38, 40; Wise Dep., pp. 18, 19). From the conversations it was understood that Bennett would immediately go to Seattle to check Whidbey Island and look into the joint venturers' assets, with the thought of marshaling the same to off-set loses at Amarillo and that he would also set up a joint control on the Amarillo project between the joint venturers and American (Wise Dep., p. 14; Cromwell Dep., pp. 36, 39). All of the discussions were with regard to the Amarillo losses and the possible liability of Roberts and it was the general consensus of all present at the meeting that the likelihood of a loss to either Roberts or American was remote since the Whidbey Island profits and assets of the joint venturers appeared to be such that Amarillo losses would be completely off-set thereby (Cromwell Dep., pp. 35, 36; Bennett Dep., pp. 10, 74; Wise Dep., pp. 17, 18, 22).

By his own testimony Bennett admitted that the general tenor of the conversation, after it became evident that Roberts could not physically or financially take over the job, was that American would step into the Amarillo project and marshal assets of the joint venturers as collateral security to off-set the losses (Bennett Dep., p. 29).

Following the meeting at Roberts' home, Bennett went to Seattle with Vitt. In Seattle he checked on Whidbey Island which appeared to be financially

stable and employed one Harold Willets to represent American as its attorney in Seattle (Bennett Dep., p. 53). Vitt owned various apartment houses in Seattle as well as in Idaho and Montana, all of which were available as collateral security (Bennett Dep., p. 20; Wise Dep., pp. 21-22). A pledge agreement was prepared by American's attorney, Willets, (Bennett Dep., pp. 21 and 53) and presented to Vitt for execution but the agreement, as prepared by Willets, (Defs. Ex. 9) pledged these assets to American to cover *first,* any losses which *might* occur on Whidbey Island and secondly, the Amarillo losses. Bennett acknowledged that the agreement was thus drafted by American purposely to protect itself on Whidbey Island since American had no independent indemnitor there as it did on the Amarillo losses (Bennett Dep., pp. 22, 23, 24, 68, 69, 74) and by so doing, American fully intended to prevent Roberts from having these assets applied first as off-sets on the Amarillo losses (Bennett Dep., p. 68).

Roberts, of course, was not consulted with regard to the terms or effect of this pledge agreement (Bennett Dep., pp. 24, 74). The first knowledge he had thereof was on October 14, 1959, when Bennett met with Roberts' attorneys in Boise and gave them copies of the Amarillo joint control agreement dated October 13 (Plfs. Ex. 7), the Whidbey Island joint control agreement dated October 11 (Defs. Ex. 8) and the pledge agreement (Defs. Ex. 9) (Bennett Dep., p. 27). Amarillo losses were known at this time to be in excess of $600,000.00 while Whidbey Island still

anticipated a profit. No losses were then contemplated at Whidbey Island, in fact, at a meeting between Bennett and Roberts' attorneys as late as July 15, 1960, when the Amarillo losses had climbed to almost a million dollars, it was still contemplated by American that Whidbey Island would show a profit of between $100,000.00 and $300,000.00 (Bennett Dep., pp. 36, 37 and 38).

Eugene Anderson, one of Robert's attorneys, immediately following the meeting with Bennett in Boise on October 14, 1959, telephoned Harold Willets, American's attorney in Seattle, and objected to the application of Vitt assets to Whidbey Island as set forth in the pledge agreement (Bennett Dep., p. 58). He also wrote to Willets the same day (Defs. Ex. 10), again outlining this objection.

The parties have agreed, during the course of this litigation, that the net and liquidated value of the Vitt assets secured by American under the pledge agreement is $350,000.00. This agreement is the basis of that figure allowed as a set-off.

Only toward the end of 1960, almost a full year after the pledge agreement, did it become apparent that the Whidbey Island profits were vanishing and that Whidbey Island might sustain a loss (Bennett Dep., pp. 75, 76). These losses have ultimately exceeded $600,000.00 (Bennett Dep., p. 59).

While the amended complaint of plaintiffs is the basis upon which this cause was submitted to the trial

court and the original complaint is not part of this record on appeal, the original complaint filed April 1, 1960, sought only a total sum of $666,443.28 broken down into $580,102.72 already expended, $86,340.56 additional claims known of and there was included a general allegation that there would be further claims as well as costs, fees and expenses (Appendix A). The amended complaint was filed February 27, 1961 (Tr. p. 4) wherein the additional sums incurred were increased from $86,340.56 to $432,090.52 (Tr. p. 13), and a figure of $82,001.85 was asserted to have been paid for expenses (Tr. p. 14). The total amount of the prayer was thus increased from $666,443.28 to $1,094,195.09 (Tr. p. 18).

Defendants Roberts, by their answer (Tr. p. 22, par. 6) denied the losses claimed by American and affirmatively asserted that American had failed to obtain, or had obtained and failed to apply against losses, various assets of other defendants, by reason whereof defendants Roberts should be relieved of all obligation under the indemnity agreement or, alternatively, should be relieved of obligation at least to the extent of the assets misappropriated. By its pretrial order, the court included therein the contentions of parties (Tr. p. 40). The contentions of defendants Roberts (Tr. pp. 44-54) reiterated and amplified these defenses to the claim of the plaintiffs and furthermore, defendants Roberts offered to return, and tendered (Tr. p. 53), the $75,791.46 paid them for their indemnity. These contentions and tender were filed September 29, 1961 (Tr. p. 44).

During the course of litigation, on June 13, 1961, attorneys for plaintiffs, defendants Roberts and Johnson and defendant Vitt personally, all signed an agreement (Appendix B) which was the culmination of several days in Amarillo examining, in conjunction with accountants, the claimed expenses of American. It is quite clear therefrom that the amount finally agreed to as being properly expended by American was less than the amount claimed by American. This agreement resulted in a stipulation to the court concerning proof of the amount involved (Tr. p. 32), although defendants reserved their defenses of non-liability or set-off. As shown in the agreement (Appendix B) the parties agreed, following their own examination of the records, that plaintiff's claim totaled, without further proof as to necessity or amount, $1,025,868.63 together with a contingent claim which could increase the amount by $23,500.00. The contingency thereafter arose and in June 1962, the parties stipulated that fact to the court, which resulted in the court's order amending pre-trial order (Tr. p. 60). The pre-trial order (Tr. p. 32) reflects that correction in amount. Thus, it was not until June 15, 1962, that the final amount totaling $1,049,218.63 was arrived at.

The parties submitted the case upon the written record, various stipulations and the depositions. On February 11, 1963, the court filed its memorandum opinion (Appendix C). This opinion actually contained findings but nevertheless additional findings were prepared by appellants' counsel and submitted to the court at the court's request.

In addition to granting relief to these defendants to the extent of a set-off of $350,000.00, being the value of the Vitt securities, the court also granted these defendants another $30,000.00 set-off and made provision for application of other sums if and when recovered. Interest was allowed on the final amount so determined only from date of judgment (Tr. pp. 92-96). American appeals from that portion of the judgment awarding the $350,000.00 off-set and granting interest only from the date of judgment.

During the course of litigation, defendants Stringfellow and Johnson, et ux, stipulated that judgment be entered against them and in favor of appellants for the amount of $1,049,218.63 (Tr. p. 74). This was the amount set forth in the pre-trial order pursuant to order of the court (Tr. p. 60) following agreement of the parties, and no interest whatsoever was sought or recovered by appellants against these other defendants.

The only issues raised by this appeal are:

1. Are appellants entitled to interest prior to date of judgment and if so, from when and on what amount? and,

2. Did the court err in allowing appellees a set-off of $350,000.00, being the value of the Vitt assets?

ARGUMENT

INTEREST WAS PROPERLY ALLOWED FROM DATE OF JUDGMENT.

Appellants seek a determination in this court that interest on the final amount found due them should be computed at least from April 1, 1960, which was the date the original complaint in this case was filed. Perhaps a chronological history of appellants' claimed expenditures would be helpful.

At the time of filing the original complaint, April 1, 1960, appellants sought a total of $666,443.28, indicating, additionally, further sums would be expended in the future (Appendix A). On February 27, 1961, (Tr. p. 4) appellants filed an amended complaint wherein the total amount then sought to be recovered was increased to $1,094,195.09 (Tr. p. 18).

In June 1961 counsel for the parties went to Amarillo, Texas, and spent two days, in conjunction with accountants, examining appellants' accounts in order to arrive at some determination of how much money appellants had properly and necessarily expended to complete the project. These sums obviously were not ascertained nor ascertainable by simple computation unless, of course, we take the position, as appellants apparently do, that all that had to be done was to total up their expense vouchers. These examinations culminated in an agreement (Appendix B) dated June 13, 1961, which in turn resulted in the court's pre-trial order setting forth that appellants had reasonably expended a total sum of $1,025,868.63 with a contingency of an additional $23,350.00. The pre-trial

order in the transcript (Tr. p. 32) sets forth a total sum of $1,049,218.63 but this figure is an amendment reflected by order of the court dated June 14, 1962, (Tr. pp. 60, 61) following appellants' payment, in June 1962, of the contingent $23,350.00. Appellants' contentions (Tr. p. 42) confirm the amounts above stated.

Thus, appellants sought by their initial complaint to recover approximately $666,000.00. They sought by their amended complaint to recover approximately $1,094,000.00. At all times until the agreement (Appendix B) appellees disputed both the reasonableness and the amount of appellants' claims. The agreement (Appendix B) acknowledges there were disputes as to certain claimed expenditures and approximately $70,000.00 of claimed expenditures were deleted from appellants' claims. Between April 1960, when the original complaint was filed and February, 1961, when the amended complaint was filed, appellants continued to expend additional sums and as late as June 1962, spent an additional $23,350.00.

At no time, at least until the agreement of June 13, 1961, were the expenditures of appellants ascertained and at no time until the judgment in this case was it determined legally that appellees were obligated to pay none, all, or any portion thereof.

Appellants seek interest on the final amount found due by the court from April 1, 1960. At that time they had in their possession the value of $380,000.00 in securities which the court determined should be

off-set from appellees' liability. The most they were entitled to on that date therefore would have been approximately $286,000.00 and from this there should even be deducted such portion of the $70,000.00 disallowed by the agreement (Appendix B) as had been incurred up to that time. Appellants seek also to recover interest on moneys they had not even expended at that date but were continually expending thereafter.

Appellants, in support of their position, rely primarily on the Idaho cases of *Hendricks v. Goldridge Mines, Inc.,* 56 Idaho 325, 54 Pac. 2d 254, and *Guyman v. Anderson,* 75 Idaho 294, 271 Pac. 2d 1020.

In both of these actions plaintiff sought to enforce a mechanic's lien. In each, the money was due directly under an agreement, either express or implied, to pay for the work performed.

In *Guyman* there was no question that the laborer had performed the work or that the property owner had expressly or impliedly agreed to pay therefor. The only question was the amount due and the Idaho court held that since this amount could be fixed by a recognized standard, interest was allowed.

Likewise, in *Hendricks* there was no question of the money being due directly on the agreement to perform the work. Since there were payments and off-sets involved, the Idaho court held the account to be in the nature of an "open account" with interest accruing three months following the last debit item (Idaho Code, 27-1904(7)).

In the instant case no money is due appellants by the terms of Exhibit 1. By that document itself, appellees owed no sums whatsoever. Idaho Code, 27-1904(1) would not seem to be applicable. Appellees merely agreed to indemnify appellants against possible future losses which *might* arise and certainly were not known or stated at that time. Thus, while the basis for liability is founded in the agreement, the money became due in the future upon the happening of certain contingencies or events and the money became due not by reason of the mere contract but by reason of the losses which were subsequently incurred. Idaho Code, 27-1904(1) more logically contemplates a contract wherein the payment of a stated sum of money is specifically provided for, as for instance, in the case of a promissory note, a purchase contract, an agreement to perform work for a fixed consideration, and the like.

Idaho Code, 27-1904(2), if applicable, would logically have reference to the date of judgment since the amount ultimately found due was not determined until the date of the judgment nor was appellees' liability to pay any portion thereof fixed until date of judgment.

The most that could be said is that because of the continuing expenditures by appellants, the moneys debited to the account of appellees were in the nature of an open account, as in the *Hendricks* case, and no interest would be due and owing until three months following the date of the last debit item which was in June 1962.

Appellees, of course, set out defenses to their claimed liability. They also denied the reasonableness and necessity of the claimed expenditures by appellants, $70,000.00 of which were disallowed by agreement (Appendix B). As pointed out in *Lundgren v. Freeman,* 9th Circuit 1962, 307 Fed. 2d 104, 111, where there are cross demands and defenses, some of which were allowed and some were not, it cannot be fairly said that the net amount ultimately due was ascertained or ascertainable until the award had been made. This position is supported in *Donaldson v. Josephson,* 71 Idaho 207, 228 Pac. 2d 941, wherein the Idaho court held that where there are mutual claims between the parties, made up of items of claims and set-offs, payment of interest commences from the date the accounting is ascertained, which in the instant case would be the date of the judgment.

Thus, the amount properly expended by appellants over a period of late 1959 to June 1962 was not ascertainable by simple computation nor at all until the stipulation which resulted in the court order (Tr. pp. 60, 61) and even then, appellants' liability for payment of any portion of that amount was not ascertained or capable of ascertainment until submission of the cause to the court and the court's judgment of March 28, 1963.

It should be noted that in the judgments entered against defendants Stringfellow and Johnson, pursuant to stipulation and agreement, no interest was awarded nor, in the stipuation, was any such interest sought by appellants. Why should interest be awarded

against appellees and none be awarded against other defendants?

Appellees feel therefore that the allowance of interest only from the date of the judgment was entirely proper and that any award of interest from April 1, 1960, as sought by appellants would amount to the granting to them of interest on moneys not even expended by them at the time.

ULTIMATE DECISION OF THE TRIAL COURT THAT APPELLEES WERE ENTITLED TO A $350,000.00 SET-OFF IS AMPLY SUPPORTED BY EQUITABLE AND LEGAL THEORIES AS APPLIED TO ACTUAL FACTS IN THIS CASE.

Unfortunately, the findings in this case, as prepared by appellants' counsel and adopted by the court, are meager in statement of facts which the court obviously found to exist and which warranted granting of the set-off to appellees. The statement in paragraph XII of the findings (Tr. p. 72) "That on or about October 4 said W. H. Bennett and K. H. Vitt met with defendants Roberts and Cromwell and Wise in the home of the defendants Roberts, Boise, Idaho, wherein further conversations were had, concerning the loss at Amarillo." has reference to the facts upon which the court's decision is predicated but does not set these facts out with sufficient detail or clarity. Reference must therefore be had to the actual evidence in the case.

While appellees recovered judgment in the District Court, appellees were granted a substantial off-set.

It is appellants who feel aggrieved by the judgment and have appealed therefrom. Appellees are therefore, in a practical sense, the prevailing parties in this case and this court should take that view of the evidence most favorable to the court's decision allowing the set-off (*Los Angeles Shipbuilding and Dry Dock Corp. v. U.S.,* 289 Fed. 2d 222; *Zimmerman v. Montour R. Co.,* 296 Fed. 2d 97, cert. den., 369 U.S. 828, 7 L. Ed. 2d 793).

Findings of the trial court must be sustained unless clearly erroneous (FRCP, Rule 52(a); *Los Angeles Shipbuilding and Dry Dock Corp. v. U.S.,* supra), therefore, the decision of the District Court on matters of fact should not be disturbed if supported by some evidence, even though conflicting.

The trial court's memorandum opinion may be useful to provide a more ample understanding of the issues before the court. It is set out herein as Appendix C. Its use on this appeal is not precluded and indeed may be used to supplement otherwise inadequate findings of fact (*American Pipe and Steel Corp. v. Firestone Tire and Rubber Co.,* 292 Fed. 2d 640).

Let us then examine the evidence which motivated the court in granting the $350,000.00 set-off to appellees.

When Roberts initially agreed to the indemnification, it was on the express condition that he be protected to the extent of the assets of the joint venturers. This was made clear in his commitment letter (Defs. Ex. 3; Tr. p. 35) and his attorney, Fred Cromwell,

also made this condition known to American's agent, Baxter (Cromwell Dep., pp. 7 and 33). American accepted Roberts' indemnification with full knowledge of this requirement and obviously acquiesced therein, in fact, to satisfy Roberts that the assets of the joint venturers would be available for his protection, Baxter had the joint venturers send Roberts a telegram confirming this requirement (Tr. p. 35; Cromwell Dep., pp. 33-35). While admittedly this telegram, by its technical terms, may not have constituted a valid assignment, Roberts obviously felt that at least all parties were in agreement that he was to be secured to the extent of the joint venturers' assets and he therefore executed the indemnity agreement with that understanding (Cromwell Dep., pp. 34-35) and American accepted his indemnity with that understanding.

The separate indemnification agreements of the joint venturers, attached to Plaintiffs' Exhibit 1 as attachments D, E and F were, by the terms of Exhibit 1, deemed to be for the benefit and protection of Roberts and under paragraph 3 of these bond applications, as well as by the indemnity agreement itself, the joint venturers agreed to indemnify against any loss. Further, under section 15(a) thereof, they agreed to furnish additional collateral security if necessary. By the terms of Exhibit 1 these agreements were deemed to be for the protection and benefit of Roberts and on page 6 of Exhibit 1, defendants Roberts were specifically subrogated to all rights of American.

The Amarillo project was commenced in 1958. Following its commencement, and in June 1959 (Tr. p.

38) these same joint venturers contracted to build a similar project for the government at Whidbey Island in the State of Washington. American also executed the bonds for these joint venturers on the Whidbey Island project (Tr. p. 38). Roberts had no connection with the Whidbey Island project. Through some inadvertence within the company, American neglected or failed to obtain a third party indemnitor on its Whidbey Island bonds (Bennett Dep., p. 9; Cromwell Dep., pp. 19, 37). This becomes considerably important since in the subsequent course of events American well knew, after the Amarillo project became financially unstable, that if these same joint venturers ran into trouble on Whidbey Island, any losses incurred there would have to be sustained by American only whereas American could fall back on Roberts for indemnification of Amarillo losses (Bennett Dep., p. 23).

On September 23, 1959, when the joint venturers gave notice to American of their need for financial assistance in order to complete the Amarillo project it was thought that Amarillo losses would approximate $600,000.00 to $700,000.00 (Plfs. Exs. 5 and 6).

Roberts immediately dispatched to the scene of the project his attorney and an independent engineer and contractor, one Paul Wise. These two met with American's agent, Bennett, at Amarillo (Cromwell Dep., pp. 10-12; Bennett Dep., pp. 4, 5; Wise Dep., pp. 3, 4). Cromwell and Wise went to Amarillo primarily to merely appraise the situation and report back to Roberts (Cromwell Dep., p. 10). They returned to Boise and on October 4, 1959, met at the Roberts home with

Roberts, Bennett and K. H. Vitt, one of the joint venturers (Cromwell Dep., pp. 15, 16; Bennett Dep., pp. 5, 6; Wise Dep., pp. 8-10). Roberts was in very poor health (Wise Dep., pp. 8, 9; Cromwell Dep., p. 23) and it was quite apparent even to Bennett that Roberts was not physically capable of taking over the Amarillo project or personally seeing to its completion (Bennett Dep., p. 15; Wise Dep., p. 15) and it was also obvious to Bennett that Roberts could not financially see to the completion of the project and that the bonding company would have to undertake the same (Bennett Dep., pp. 14, 15, 18, 28, 49, 50; Cromwell Dep., pp. 17, 18).

With this understanding the parties then discussed what could be done to protect Roberts from loss on his indemnification. They discussed the bonding company taking over the job under a joint control agreement with the joint venturers (Cromwell Dep., p. 18; Wise Dep., p. 11; Bennett Dep., pp. 15, 18) and considerable time was spent discussing the recoupment of losses from anticipated profits on Whidbey Island and application of assets of the joint venturers (Wise Dep., pp. 9, 10, 21; Cromwell Dep., pp. 20, 21, 22, 27, 28, 35-40; Bennett Dep., pp. 7, 10, 12). Vitt indicated that the Whidbey Island profits would go a long way to pay off the Amarillo losses (Wise Dep., pp. 11, 17, 22; Cromwell Dep., pp. 19, 22, 35, 36; Bennett Dep., p. 10).

Roberts clearly stated to Bennett that his understanding of the situation was that his liability under

the indemnity agreement would attach only to that amount of loss which exceeded application of the Whidbey Island profits and the joint venturers' assets (Wise Dep., pp. 10, 11, 13, 17) and Cromwell made it clear to Bennett that the joint venturers' assets should be applied to the Amarillo losses before any ultimate liability for repayment of loss accrued to Roberts (Cromwell Dep., pp. 20-22, 27-28; Wise Dep., p. 19). The parties, of course, were not at that time disputing Roberts' ultimate liability to repay American any unrecoverable losses but it was understood and agreed that American would take over the project, pay out its own money to complete the same and the repayment by Roberts was to be determined after off-setting these losses with Whidbey Island profits and joint venturers' assets. It was the definite understanding of all those at the meeting that the assets of the joint venturers stood between Roberts and his ultimate liability for losses at Amarillo (Cromwell Dep., pp. 22, 35, 37, 38, 40; Wise Dep., pp. 18-19). Bennett himself admitted this to be the case (Bennett Dep., p. 29):

> "Q. I am not talking about any specific agreements, I am just talking about your conversations and understandings. Certainly from the tenor of the whole conversation out there the idea was that the American Casualty Company would step in the Amarillo project, put up the money to complete it, and they would check the other joint venturers' assets and obtain whatever collateral security they could to offset losses; isn't that the tenor of the conversation?
>
> A. That was the general tenor of it, yes."

It should be borne in mind that there were no losses except Amarillo losses under discussion (Bennett Dep., pp. 16, 17; Tr. p. 38). In fact, profits were contemplated at Whidbey Island as off-sets to the Amarillo losses. All of the parties felt that with the application of Whidbey Island profits and the joint venturers' assets, the likelihood of ultimate loss to Roberts at Amarillo was remote (Cromwell Dep., pp. 35, 36; Bennett Dep., pp. 10, 74; Wise Dep., pp. 17, 18, 22). It was understood that immediately following the meeting Bennett would go to Seattle, check on Whidbey Island, set up a joint control agreement on the Amarillo project and look into the joint venturers' assets with the thought of marshaling the same to offset Amarillo losses (Wise Dep., p. 14; Cromwell Dep., pp. 36, 39).

Bennett did go to Seattle where he checked on the Whidbey Island project which appeared to be financially stable although it was moving more slowly than had been hoped (Bennett Dep., pp. 20, 38-41). He discussed with Vitt, Stringfellow and Johnson's attorney their various assets (Bennett Dep., pp. 19, 20). He also employed one Harold Willets to act as American's attorney (Bennett Dep., p. 53) and Willets drew the joint control agreements on Amarillo, Whidbey Island and the pledge agreement, Defs. Exs. 7, 8 and 9.

Appellants in their brief make mention of the fact that the Vitt assets were "voluntarily" pledged to American and Vitt could well choose to apply them to Whidbey Island losses if he wanted to. In the sense that no one put a gun to Vitt's head and said "Sign

or else'' his execution of the pledge agreement was voluntary. In the sense that Vitt had no choice but to sign, that the agreement was prepared by American's attorneys to suit American's own purposes and provided for application of the Vitt securities first to Whidbey Island losses and that this was done purposely by American to prevent Roberts from having those assets applied to Amarillo losses are facts which make appellants' claim of ''voluntary'' action on Vitt's part rather specious. This provision of the pledge agreement was not inserted therein by accident and Bennett testified that the manner in which the Vitt assets were to be applied had been discussd in almost daily contact with his office in Reading, Pennsylvania, and that he was actually instructed by the office to apply the Vitt assets to the Whidbey Island project first (Bennett Dep., p. 24). Any claim that Vitt had a right to pledge his assets for a purpose other than Roberts' protection at Amarillo violates the telegram (Tr. p. 35) and the provisions of Ex. 1 and its attachments D, E and F.

Nor was Roberts consulted with regard thereto (Bennett Dep., p. 24). Following the meeting at his home in Boise, on the basis of the discussions had thereat and the understanding resulting therefrom, Roberts undertook no further independent action to protect himself, on the knowledge that American would undertake whatever action was available to protect against the Amarillo losses. However, contrary to the understandings at Roberts' home, and upon directions from his superiors, and without con-

sulting or advising Roberts of what might be plainly termed a "double cross", Bennett secured the Vitt assets for American's purposes only. His testimony in this regard is as follows: (Bennett Dep., pp. 22, 23)

"Q. You were certainly acting to protect the American Casualty Company first because it had no independent indemnitor at Whidbey Island, weren't you?

A. I was acting to protect the American Casualty Company because I was employed by the American Casualty Company.

Q. All right, and because they had no independent indemnitor at Whidbey Island?

A. No, no independent indemnitor at Whidby Island.

Q. And that is why the Vitt pledge was made to secure any possible or contingent Whidby Island losses first, wasn't it?

A. I explained a few minutes ago there were several reasons for that.

Q. All right, but you did that primarily because you had no independent indemnitor on the Whidby Island project?

A. Not primarily; no, sir.

Q. Well, you knew that if any losses did occur at Whidby Island it was American Casualty's loss without any recourse to a third-party indemnitor?

A. That is correct.

Q. Whereas, at Amarillo you had Mr. Roberts as third-party indemnitor?

A. That is true.

Q. And you were acting on behalf of the American Casualty Company and you were securing their interest first?

A. That is correct."

Bennett Dep., p. 68:

"Q. I note here that you point out in your memorandum that: 'At this point it is well to mention that had we succeeded in getting the joint venturers to borrow money on their assets, we probably would not have been able to apply the proceeds of such assets to any loss other than the loss at Amarillo, whereas now we can first apply the proceeds to Whidby if we have a loss there and then to Amarillo.' That is in your memorandum?

A. That is correct.

Q. In other words, it was your feeling that by taking Vitt's securities as pledged which you did you could protect American Casualty if there were any possible losses at Whidby Island first and then Mr. Roberts wouldn't be able to force the application of those assets to the Amarillo lawsuit (losses) which were then known to have existed?

A. That is correct.

Q. That was done supposedly?

A. Yes, sir—well, subsequently after we had attempted to get Johnson, Stringfellow and Vitt all three to pool all their assets and throw into the kitty enough money to cover their known losses.

Q. But you did intend the pledge agreement from Vitt to apply first to Whidby Island and then to Amarillo?

A. That is correct.

Q. That wasn't done just by accident?

A. No, sir."

Only after American had obtained the pledge agreement, without consultation with Roberts, did Ameri-

can advise Roberts, through his attorneys, of the terms thereof (Bennett Dep., p. 27).

Eugene Anderson, one of Roberts' attorneys, immediately telephoned Harold Willets, American's attorney in Seattle, and objected to this misapplication of Vitt assets (Bennett Dep., p. 58). He also wrote to Willets the same day (Defs. Ex. 10) and again outlined these objections.

It should be recalled that the Amarillo losses were at this time known to exceed $600,000.00 while Whidbey Island was still anticipating a profit. In fact, at a meeting between Bennett and Roberts' attorneys as late as July 15, 1960, over six months later, at a time when Amarillo losses had climbed to almost one million dollars, it was still contemplated by American that a profit of between $100,000.00 and $300,000.00 would be realized from Whidbey Island (Bennett Dep., pp. 36-38), which under the terms of the Whidbey Island joint control agreement (Defs. Ex. 8) were to be applied as off-sets to Amarillo losses. Only toward the end of 1960, almost a full year after the pledge agreement, did it become apparent that Whidbey Island profits were vanishing and that losses might be sustained thereat (Bennett Dep., pp. 75, 76).

These then are the facts upon which the trial court made its ultimate determination that American Casualty Company was under an obligation to utilize the Vitt assets for the purpose of off-setting Amarillo losses and that these assets should have been so applied

rather than diverted by American to Whidbey Island losses.

Appellees asserted in their answer and raised as issues in the case the fact that American had obtained such assets and that the same should have been applied to Amarillo losses (Tr. p. 23). They further set out in their contentions the true facts of the case, the discussions at the Roberts' home and the understandings arrived thereat (Tr. pp. 44-54). These were a part of the pre-trial order (Tr. p. 40). They further asserted therein (Tr. p. 53) that American had breached its duty and agreement and had failed to act in good faith toward appellees, by reason whereof they should be absolved from any and all liability under the indemnity agreement, Exhibit 1.

Parties may assert any or all claims or defenses they may have. When equitable defenses are interposed, the maxims of equity cannot be disregarded and the court should grant all proper relief to which a party is entitled as disclosed by the facts in the case (FRCP, Rules 2, 54(c); Barron and Holtzoff, Fed. Prac. and Pro., Vol. 1, pp. 620, 622). In making its ultimate determination in this case the question before the trial court was not necessarily what specific relief did a party seek but rather what relief was he entitled to under the facts (Barron and Holtzoff, Vol. 3, pp. 35-37).

Appellees initially felt that he wrongful acts of appellants in misapplying the Vitt assets, to the obvious prejudice and increased risk of appellees, was such an act of bad faith and unconscionable dealing

as to absolve them from any liability under the indemnity agreement. With this the trial court did not entirely agree and absolved appellees from liability only to the extent of the set-offs allowed. That the set-off of $350,000.00 is just and proper under the facts of this case and under the general laws of estoppel and indemnification is without question.

The doctrine of equitable estoppel is founded on premises of morality and fair dealing and is intended to subserve the ends of justice (19 Am. Jur. 640, section 42). The law will not stand by in silence and see one party mislead another to his injury, whether by ignorance, negligence or design (*Tracey v. Standard Accident Ins. Corp.,* 109 Atl. 490). The doctrine holds a person to a representation made or a position affirmed where otherwise inequitable consequences would result to another, who, having the right to do so under all of the circumstances of the case, has in good faith relied thereon and been misled to his injury (19 Am. Jur. 642).

Neither actual fraud nor bad faith are generally considered essential elements in the application of the doctrine of equitable estoppel. In their absence fraud is construed from the result of the conduct intended or calculated or which might reasonably be expected to influence the conduct of the other party and mislead him to his prejudice. The fraud frequently is construed to arise from the subsequent attempt to contravert the conduct undertaken to the injury of one who has relied thereon (19 Am. Jur. 646, 647).

Thus, as applied to this case, at the meeting in the Roberts' home it was apparent to American's agent, Bennett, that Roberts was neither physically nor financially able to undertake the completion of the Amarillo project and that American would have to do so. It was also the general tenor of the discussions, in fact, the whole subject thereof, that American would take over the Amarillo project or at least see to its completion under a joint control agreement and in order to protect against Amarillo losses, would obtain assignment of Whidbey Island profits and would secure whatever other assets of the joint venturers might be available. With this understanding, Roberts assumed that the future acts of American would be directed toward a protection against and reduction of Amarillo losses and based upon these discussions and understandings and the conduct of Bennett at that meeting, Roberts further asumed that there was nothing more he could do except await the completion of the Amarillo project and a determination of its final losses, if any, after American had secured and applied thereto other assets of the joint venturers and Whidbey Island profits. In fact, all concerned at the meeting felt that these would be sufficient to relieve Roberts of anl ultimate liability.

It is not contended that American initially had any "duty" to marshal the additional security, however, having agreed to do so, and having actually obtained such security, it did have a duty to properly apply the same to Amarillo losses.

The conduct of American, acting through its agent Bennett, was certainly such as to lull Roberts into a false sense of security and mislead him, to his prejudice, in light of subsequent activities on the part of American. Certainly on the basis of the clear understanding that American would carry the burden with regard to the Amarillo project and the protection against accruing losses thereat, including marshaling of assets, he had the right to assume as he did.

It is immaterial that Bennett, at the time of the meeting, had no intent to deceive Roberts and was acting entirely in good faith. The subsequent act of American in obtaining a pledge of the Vitt assets specifically for application first to non-existent losses on the Whidbey Island project, when Amarillo losses then exceeded $600,000.00 and in doing this purposely to prevent Roberts from having them applied as offsets to Amarillo losses, amounted to a constructive fraud on Roberts, and American, under the doctrine of equitable estoppel, was properly prevented by the court from such misapplication of assets.

The doctrine of estoppel should further be applied to American when we recall that it accepted Roberts' indemnification initially on the clearly stated condition that the joint venturers' assets would be for his protection in event of loss. Had American any reservations in this regard then was the time to have made them known. By acquiescing in Roberts' requirement concerning this matter and accepting his indemnification on that clearly stated position, Ameri-

can's subsequent conduct becomes doubly unconscionable. Any claim that Vitt had a right to violate his written obligations in this regard should be viewed in the same light.

It would seem that if there is any warranted circumstance for the application of the equitable doctrine of estoppel, it should be applied here. American's conduct in this case, in agreeing to obtain additional security from the joint venturers to apply against Amarillo losses and then applying that security to its own benefit and Roberts' prejudice was unjust, inequitable, reprehensible and actually borders on downright dishonesty. Small wonder appellees claimed absolvement from *any* liability in this case.

Equally, under the general laws of indemnification, their liability should be reduced, as it was, if not totally cancelled.

An indemnitee owes a duty to the indemnitor to act in such a way as to protect the indemnitor to the extent that it was reasonable to do so under the circumstances (*Union Oil Company of California v. Lull,* 349 Pac. 2d 243, 250).

This duty arises not from any contract but from the equities of the situation (*Union Oil Company of California v. Lull,* supra; *Stearns, Law of Suretyship,* 5th Ed., 105, 106).

Any act on the part of the indemnitee which partially increases the risk or liability of the indemnitor, or otherwise injures or prejudices his rights and

remedies, discharges the indemnitor under the contract of indemnity (42 C.J.S. 634; *Hiern v. St. Paul-Mercury Indemnity Co.,* 262 Fed. 2d 526; *U. S. Fidelity and Guaranty Co. v. Putfark,* 158 So. 9).

The rule as outlined in *Hiern v. St. Paul-Mercury Indemnity Co.* has been heretofore recognized by the District Court for the District of Idaho (*U. S. v. Firemen's Fund Ins. Co.,* 191 Fed. Sup. 317). The trial judge did not therein apply the rule however, because the circumstances of the case did not require its application. Therein, the indemnitor agreed to indemnify up to $24,000.00 and the bonding company increased the bond without notifying the indemnitor. While recognizing the general rule stated in *Hiern,* the trial judge held that it need not be applied since the bonding company was seeking only $24,000.00 from its indemnitor and the increase of the bond without notice to the indemnitor was not prejudicial nor had it increased his risk.

In the case of *Providence Fall River and H. S. Co. v. Massachusetts Bay S. S. Corp.,* 38 Fed. 2d 674, a bond was obtained on the purchase of a ship guaranteeing the seller be saved harmless from all liens which might accrue before complete payment was made on the vessel by the buyer. A purchase money mortgage was given the seller but he failed to record it. Various liens subsequently attached and the seller sought protection under the bond. The court found that he could have recorded the mortgage and protected against those liens which were thus filed and when he

failed to record his mortgage and permitted the liens to become attached to the vessel, he prejudiced the rights of the surety and increased its risk and the surety was therefore absolved from payment and liability.

A guarantor or indemnitor is entitled to the benefit of the securities which the creditor holds and when the creditor voluntarily diminishes the value of the security, the gurantor or indemnitor is discharged pro tanto (*Boorstein v. Miller,* 3 Atl. 837).

The court will readily discern from the cases that bad faith on the part of the indemnitee is not a necessary element of the above stated doctrines. Its obvious presence in this case however makes their application even more compelling.

Furthemore, under the terms of Exhibit 1, appellees were subrogated to all rights of American under the joint venturers' bond applications and indemnity agreements (Exhibits 1, D, E, and F) and all terms of the bond applications, which include American's right to additional collateral security, were deemed to be for the benefit of appellees (Defs. Ex. 1).

There is no question but that the acts of American in wrongfully diverting to its own benefit $350,000.00 of collateral security resulted in direct financial loss to appellees and increased their risk and prejudiced their position. Appellants, rather than appealing from the court's allowance of this set-off, should feel fortunate that appellees were not relieved of liability

in toto. The conduct of appellants would have amply warranted such a result and the $350,000.00 set-off allowed by the court should be sustained.

Dated, Boise, Idaho,
September 19, 1963.

Respectfully submitted,
SAMUEL KAUFMAN of
ANDERSON, KAUFMAN AND ANDERSON,
Attorneys for Appellees.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

SAMUEL KAUFMAN,
Attorney for Appellees.

(Appendices A, B and C Follow)

Appendices.

Appendix A

PERTINENT PORTIONS OF ORIGINAL COMPLAINT

FIRST COUNT

"19. In partial discharge and partial performance of plaintiff's obligation under the bonds referred to in paragraph 12 hereof, in order to procure completion of said project, plaintiff expended as of November, 1959, the aggregate sum of $580,102.72 and became obligated to pay additional moneys to certain subcontractors and suppliers of material, which latter obligations are now being audited and, to the extent of liability of plaintiffs in the premises, processed for payment."

"22. Since November of 1959, plaintiffs have been required to expend and have paid the aggregate sum of $86,340.56 to subcontractors and materialmen whose obligations have heretofore matured under the respective payment bonds, dual obligee, referred to in paragraph 12 hereof. Plaintiffs are now engaged in auditing and processing claims of other suppliers of labor and material with respect to which, as and when liability of plaintiffs has matured or if such liability does mature under any of the bonds referred to in paragraph 12 hereof, plaintiffs reserve any and all of their respective rights and remedies against defendants and each and every thereof."

"24. In addition to the payments made by plaintiffs as hereinabove more particularly set forth and plaintiffs' other obligations under said bonds as same

may be finally adjudicated and determined, plaintiffs have incurred attorneys' fees, auditors' charges, investigation charges, etc., the precise total amount of which is not yet known, and plaintiffs will be liable for additional moneys and additional attorneys' fees and other charges as a result of the aforesaid default of defendants for which said respective defendants are obligated to plaintiffs as is more particularly set forth in the respective agreements of indemnity referred to in paragraphs 13 and 14 hereof."

"27. Wherefore, plaintiffs demand judgment against defendants, V. A. Roberts and Ellen M. Roberts on the First Count of Complaint at this time in the sum of $666,443.28."

SECOND COUNT

"32. Wherefore, plaintiffs demand judgment against defendants, V. A. Roberts and Ellen M. Roberts on the Second Count of Complaint at this time in the sum of $666,443.28."

PRAYER

"(a) Judgment at this time in the sum of $666,443.28, against V. A. Roberts and Ellen M. Roberts under First and Second Counts hereof, with interest and costs of suit;"

Appendix B

MEMORANDUM OF AGREEMENT

WHEREAS as the result of litigation pending in the United States District Court for the District of Idaho, Southern Division, wherein American Casualty Company of Reading, Pennsylvania, and General Reinsurance Corporation are plaintiffs, and V. A. Roberts and Ellen N. Roberts, V. O. Stringfellow, Burl Johnson and Darlene Johnson, K. H. Vitt and Katherine Vitt, and Stringfellow Amarillo Associates are defendants, attorneys for American Casualty Company, V. A. Roberts and Ellen N. Roberts, Burl Johnson and Darlene Johnson, and K. H. Vitt and Katherine Vitt, and K. H. Vitt, met in Amarillo, Texas, on the 12th day of June, 1961, for the purpose of making an examination of the records of Burke, Rowe & Co., Certified Public Accountants, to determine the items and amounts of money paid by American Casualty under its bond obligations for completion of Capehart Housing Projects at Amarillo Air Force Base, Amarillo, Texas, for and on behalf of Stringfellow Amarillo Associates and the individual partners or joint venturers thereof and,

WHEREAS the total amount claimed to have been expended by American Casualty Company for this purpose approximates $1,099,000.00 of which sum certain particular items have been questioned by attorneys for V. A. and Ellen Roberts and other items, particularly administrative expenses, have been questioned by all of the parties; and,

WHEREAS with the exception of the questions above referred to, all other payments made by American Casualty Company for the above stated purpose appear to be properly identified and reasonable and necessary expenditures made pursuant to its bond obligations for the purpose of completing said Capehart Housing Project at Amarillo Air Force Base.

Now therefore it is hereby agreed that the total amount paid or to be paid by American Casualty Company and/or General Reinsurance Corporation for the purpose of completing the Capehart Housing Project at Amarillo Air Force Base under bond obligations subject to additions and credits as hereinafter stated is the sum of $1,025,868.63, and the reasonableness, necessity and identification of this amount or any particular items making up this amount is hereby waived.

ADDITIONS:

There may be added to the above stated amount such sum as American Casualty Company may be required to pay to the United States of America for the use and benefit of Reeves Company, a corporation, and/or the Celotex Corporation on behalf of Stringfellow Amarillo Associates and/or Stringfellow, Johnson, or Vitt to satisfy any judgment which may be obtained against the said Stringfellow Amarillo Associates and/or Stringfellow, Johnson, and Vitt, in a case now pending in the District Court for the Northern District of Texas, Amarillo Division, Case Num-

ber 2813, the approximate contingent amount of which possible judgment is $23,350.00.

No other additions shall be made to the above stated amount of $1,025,868.63 with the possible addition of the Reeves Company or Celotex Corporation claim, such sum being the total and complete sum paid or to be paid by American Casualty Company and/or General Reinsurance Corporation for the completion of the Amarillo projects.

CREDITS:

There will be credited against the above stated sum such monies as may be received from the United States government or any department, agency, or agent thereof, on pending claims for additional work or monies due on the Amarillo projects, specific reference being made to the sum of approximately $100,000.00 which the government or proper agent thereof has apparently agreed to pay and the further sum of approximately $214,000.00 which is pending.

All parties defendant reserve the right to claim against the American Casualty Company and/or General Reinsurance Corporation any other set-offs or credits or reserve rights to raise any defenses relative to his or their obligations or liabilities to Roberts or American Casualty Company, other than as to gross amount above computed, it being the specific intention hereof to agree to a final amount reasonably and necessarily paid by American Casualty Company for the purpose of completing the Capehart Housing Projects at Amarillo Air Force Base, without re-

quirements on its part to further prove or identify this sum or any item thereof or to prove the reasonableness or necessity therefor and to fix and determine the amounts so paid out of pocket.

DATED this 13th day of June, 1961.

(This agreement is entered into for the purpose of inclusion in a pre-trial order.)

American Casualty Company
and
General Reinsurance Corporation
by
Willis C. Moffat
its attorney

V. A. and Ellen N. Roberts
by
Samuel Kaufman, Jr.
their attorney

Burl Johnson and Darlene Johnson
by
Carl D. Hall, Jr.
their attorney

K. H. Vitt
K. H. Vitt
(Does not constitute an appearance in any action)

Approved:
V. O. Stringfellow

Approved:
Burl Johnson

Appendix C

In the United States District Court
for the District of Idaho,
Southern Division

No. 3589

The American Casualty Company of Reading, Pennsylvania,
and
General Reinsurance Corporation,
Plaintiffs,
vs.
Idaho First National Bank, National Association, Executor of the Estate of V. A. Roberts, Deceased, and Ellen M. Roberts, V. O. Stringfellow, Burl A. Johnson and K. H. Vitt, individually and doing business under the firm name and style of Stringfellow Amarillo Associates, Darleen M. Johnson and Catherine Vitt,
Defendants.

Memorandum Opinion

Clark, Chief Judge.

This case is submitted to the Court for determination upon the records and files of the Court, including

the Pre-trial Order as amended and the depositions and exhibits admitted in evidence on stipulation of the parties. Each of the parties have submitted briefs.

Agreed facts have been stipulated by parties hereto in the Pre-trial Order on file herein, as well as the contentions of the parties, which the Court incorporates and makes a part of this Memorandum Opinion the same as if they were set forth at length herein, together with all amendments thereto.

During the pendency of this action V. A. Roberts died and the Idaho First National Bank, Executor of the Estate of V. A. Roberts, was substituted as party defendant, and there is no dispute but what proper claims were filed in due time, which were rejected by the Executor.

Under the Pre-trial Order as amended, and in accordance with the stipulation of the parties, the Court finds that the Plaintiffs are entitled to judgment against V. O. Stringfellow and Burl A. Johnson in the sum of $1,049,218.63, the sum stipulated to have been necessarily and reasonably expended by American in the performance of the obligation under the bond.

This leaves the only question for determination the amount, if any, of the liability of the Executor of the Estate of V. A. Roberts and the liability, if any, of Ellen M. Roberts.

The Court will first dispose of the question as to the liability of Ellen M. Roberts. The Court finds that Ellen M. Roberts is the wife of V. A. Roberts (de-

ceased), and that the execution of the indemnity agreement by defendant, Ellen M. Roberts, was in no sense for her own personal use or benefit or made in connection with, or for the benefit of, her separate estate or property, and judgment will not be allowed against Ellen M. Roberts separately, and judgment will run only to the community assets and not to her separate assets.

This leaves the one question, is the defendant executor of the Estate of V. A. Roberts, entitled to any offset as to the stipulated amount of $1,049,218.63, expended by American under the bond.

It would appear from the record and depositions that American was under an obligation to marshal the assets of the joint venturers, V. O. Stringfellow, Burl A. Johnson and K. H. Vitt, for the protection of both American and Roberts on the Amarillo job. These assets should have been applied to Amarillo losses. The equipment and assets of the joint venturers were assigned to American. It is difficult to determine the exact amount to be applied in the reduction of the claim against Roberts. However, it would seem that the amount of $1,049,218.63 should be reduced by the sum of $350,000.00, securities pledged that should have been credited on the loss on the Amarillo project and the sum of $30,000.00, which the Court finds as the value of the equipment and assets of the joint-venturers; and the Court so finds and judgment against the estate of V. A. Roberts is granted in the sum of $669,218.63.

On the Cross-complaint judgment will be granted against V. A. Stringfellow and Burl A. Johnson in like amount. Attorney fees are allowed Plaintiff in the sum of $15,000.00, and a like amount to Roberts Estate on the Cross-complaint.

It should be noted that there are claims still pending. If the amounts, or any part thereof, are collected the estate of Roberts should be credited therewith.

Counsel for Plaintiffs may prepare Findings of Fact, Conclusions of Law and Judgment in accordance with the opinion of the Court herein.

No. 18,675

United States Court of Appeals

For the Ninth Circuit

AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA, and GENERAL REINSURANCE CORPORATION,

Appellants,

vs.

IDAHO FIRST NATIONAL BANK, NATIONAL ASSOCIATION, Executor of the Estate of V. A. Roberts, Deceased, and ELLEN M. ROBERTS,

Appellees.

APPELLANTS' REPLY BRIEF

MOFFATT, THOMAS, BARRETT & BLANTON,
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First Security Building, Boise, Idaho,
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PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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No. 18,675

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Appellees.

APPELLANTS' REPLY BRIEF

STATEMENT

Appellees have seen fit to restate this case. However, they have not limited their statement to facts. The statement made in Appellees' Brief is replete with inference and innuendo which the Appellees deem beneficial to their position. We do not deem it necessary to discuss this matter item by item, but will point out one or two illustrations.

On page 7 of Appellees' brief, it is stated:

> "It was quite apparent also that Roberts was not financially able to take over the project and

> that the bonding company would have to do so * * * on this specific premise * * *."

The record shows that Roberts stated he could not and would not finance or take over the Amarillo project. All that this record shows is that Roberts refused to do anything whatsoever, although he knew from his own agent, Wise, that the loss could well exceed $1,000,000.00. (Wise Dep., pp. 55-56, ff. 22-25.) The uncontroverted fact remains that as an inducement to the issuance of this bond and the acceptance of Roberts' indemnity, he had furnished a financial statement to American Casualty Company showing net assets applicable to this indemnity of $2,500,000.00. (Exhibit 4.)

On page 10, relating to the Vitt pledge, it is stated:

> "A pledge agreement was prepared by American's attorney, Willets * * * and presented to Vitt for execution * * *."

The fact of the matter is that while the agreement was prepared by Willets in rough draft, and presented to Mr. Vitt in that form, Mr. Vitt was represented by his counsel, Mr. Oswald, who had the draft in his office for a day or day and a half, and the final agreement was the result of negotiations between Vitt's counsel and American's counsel. (Bennett Dep., p. 53, ff. 24-25; p. 54, ff. 1-21.)

Appellees would infer that Vitt had no voice in the preparation of this pledge, but the facts are otherwise.

On page 13 of the brief, Appellees infer that the findings of the Court are those of Appellants' counsel. It is true that the Court, by its decision, ordered Appellants' counsel to prepare and submit findings in accordance with the decision, which counsel did. These findings were lodged in accordance with the rules, and the Appellees filed voluminous objections thereto, in which they set out many of the inferences contained in their statement of facts in their brief, but the trial Court rejected all these objections, with the exception as to the allowance of interest. The findings before the Court on appeal are those of the trial Court, and were determined by the trial Court to be correct over the objections of Appellees.

ARGUMENT

TIME FOR ALLOWANCE OF INTEREST.

Appellees have wholly failed to answer many of the cases cited in Appellants' brief. They attempt to distinguish *Hendricks v. Goldridge Mines, Inc.,* 56 Idaho 325, 54 P.2d 254, and *Guyman v. Anderson,* 75 Idaho 294, 271 P.2d 1020, from the case at bar on the ground that these were enforcement of mechanics' liens. They have not, however, considered the language of the Idaho Court construing Section 27-1904, Idaho Code. In the *Hendricks* case, the Court stated:

> "It [the statute] is dealing with the subject of money due on contracts, either express or implied, and applies as well to unsettled and disputed accounts as to those where the specific sum due is fixed and determined. The only condition

is that it shall be a claim arising on a contract, express or implied."

The nature of the actions is not significant. Appellees cite *Lungren v. Freeman,* 307 F.2d 104, but this case is not applicable to the case at bar. In the first place, the statutes involved were those of the State of Oregon, which are not similar to the State of Idaho. Secondly, the facts are greatly different, inasmuch as the action involved arbitration and an award made by arbitrator. The only other authority upon which Appellees rely for their position concerning the application of the Idaho statute is *Donaldson v. Josephson,* 71 Idaho 207, 228 P.2d 941. This case does not contradict the position taken by Appellants. The action, in the first place, was one for accounting between the parties and the division of certain sugar beet checks, made payable to both parties, some of which were held by Appellant and some by Respondents. There is nothing in this action that resembles an accounting. This action is one solely under Section 27-1904, Idaho Code, subdivisions 1 and 2. It is simply suit for monies due on any contract to pay, against which the defendant asserts credits to be due him. If the position of the Appellees is correct, then interest could never be allowed on any claim under contract where the defendant disputes the amount due. This is patently not the law of Idaho.

Appellees attempt to emphasize that the stipulated reasonable and necessary loss and expenses of American were some $70,000.00, less the amount prayed in the complaint. We do not know whether this Court

will take any cognizance of the items that are not included within the record of the Court in any respect but which are contained in the Appendix to Appellees' brief, it being our understanding that the Court will not consider these matters, but, nevertheless, we believe that we can fairly state that the reason for the Amarillo agreement and the stipulation of the amounts due was to avoid a long and tedious trial, which would have been required if every voucher and item constituting the accumulated loss of over $1,094,000.00 was presented to the Court through witnesses and identification. This agreement, if the Appellate Court should pay any attention to it, was dated June 13, 1961, and would be in the nature of an account stated. Consequently, interest would be allowed from this date, even under the theories of the Appellees. If the Appellants, who suggested this procedure in lieu of protracted trial, the records and accountings being in the possession of auditors at Amarillo, are to be penalized for such procedures, then it will be necessary, in each instance, to take up the Court's time, at great expense to litigants and the Court, by the identification of every item. The fact that the ultimate agreement was something less than the amount prayed for in the complaint (and an insignificant sum in view of the amount ultimately stipulated) does not in any way indicate that such amounts were not due under the contract of indemnity within the meaning of the Idaho interest statute.

We submit that the Appellees have wholly failed to support the argument that interest should only be al-

lowable after judgment, and we further submit, in answer to the question propounded by Appellees as to why interest is not allowable against the defendants, Appellees have cross-claims against the other defendants in which they are to be awarded judgment to the same amount and extent that they are indebted to Appellants. Consequently, since they should be obligated to pay Appellants the interest from the date the same became due, and certainly not later than the filing of the complaint, they would be entitled to judgment against the cross-defendants to the same extent.

APPELLEES' THEORIES TO SUPPORT APPLICATION OF SET-OFF ARE INSUFFICIENT IN EQUITY OR AT LAW.

The Appellees begin their argument with the statement,

> "Unfortunately, the findings of this case, as prepared by Appellants' counsel and adopted by the Court, are meager in statement of facts which the court obviously found to exist".

We have pointed out before that the Appellants' version of the facts of this case was submitted to the trial Court in their objections to findings of fact and conclusions of law which appear at page 79, et seq., in the transcript of record of this matter, and were rejected by the Court. As stated in Appellants' Opening Brief, the Court apparently found as a matter of law that the pledge of securities should be applied to the credit of the indemnitors, Roberts. There is no

other conclusion that may be raised from the opinion or the findings.

Appellees devote several pages of their brief to their inferences and impressions from the evidence and assume that there was an agreement. However, even the engineer and attorney employed by Roberts stated that there was no distinct agreement, but simply how they "understood" the conversation. (Wise Dep., p. 18; Cromwell Dep., p. 21.)

Again, the Appellees, on pages 26 and 27 of their brief, assume that Vitt had no choice but to sign the agreement. However, they completely overlook the fact that Vitt had the advice of counsel, and that Vitt and his counsel had the rough draft of the agreement at least a day and a half before the agreement was typed in final form. (Bennett Dep., p. 53, ff. 24-25, p. 54, ff. 1-21.) In the several pages of Appellees' brief in which they attempt to set up some sort of agreement and allege a misappropriation of assets, they do not attempt to explain why they did not obtain Vitt's testimony by deposition or otherwise, or Roberts' testimony for that matter. Certainly Vitt, being the party who signed the agreement and who was probably more disinterested than anyone, would have been the party most knowledgeable of any agreement or the breach thereof. The fact is that there was no basis for complaining about the application of the securities of the Vitt Construction Company, which were pledged.

Regardless of these statements, we submit to the Court that as a matter of law, the record does not

permit the entry of the judgment applying these credits to the amount of the pledged assets to the indemnitors, Roberts.

APPELLEES' EQUITABLE DEFENSIVE THEORIES.

The Appellees, on page 31 of their brief, and thereafter, state that they rely upon the maxims of equity and the rule that the Court should grant all proper relief to which a party is entitled as disclosed by the facts of the case. This proposition, in general, cannot be contested. However, it cannot be strained to the extent of applying to this case. By extending such credit, the Court is, in effect and actually, reforming the pledge agreement executed by Mr. and Mrs. Vitt and the Vitt Construction Company. The Vitt Construction Company, as shown by the joint control agreement relating to Whidbey Island (Defendants' Exhibit 8), and the pledge agreement (Defendants' Exhibit 9), was an indemnitor and principal on the Whidbey Island job, but was not a party to the Amarillo project. We do not believe that this general proposition expressed in Rules 2 and 54(c) of the Federal Rules of Civil Procedure can be stretched to the point of reforming an instrument where all of the parties are not before the Court.

K. H. Vitt and Catherine Vitt were never brought within the jurisdiction of this Court and, although named parties defendant by the plaintiff and cross-defendants by the Appellees, were never served with process. It is uniformly held that all parties to the

instrument are necessary parties in any action to reform a written instrument. (76 C.J.S., p. 423.) So far as Vitt is concerned, the pledge agreement executed by him and concurred in by him stands and is applicable to his obligation arising out of the Whidbey Island indemnity agreement, which he and Vitt Construction Company executed as a part of their application for bond. If the judgment in this case is permitted to remain in its present form, the American Casualty Company would be required to extend this credit twice or in double the amount provided by the agreements.

If Roberts was seriously contending that Vitt avoided his obligation of assigning his assets to Roberts and seriously thought that he could establish that the pledge agreement was contrary to the so-called understanding at Roberts' house, then the proper action would have been to bring suit against Vitt for the reformation of this pledge agreement. American is in no position to prosecute such suit, because American contends there was no such understanding and that Vitt was free to apply his property as he saw fit.

On page 32 of their brief, Appelles, by inferences, charge American with fraud, although at the same time stating that it is not necessary. Vitt participated in the conversations, as is shown in many places in the depositions, and if there was any agreement for the application of his assets with Roberts, it would have been made with Vitt, and Roberts should have attacked Vitt on this basis. The fact that no effort

was made toward Vitt, either by testimony or by way of action, loudly contradicts all of the Appellees' statements concerning understandings, fraud, equity, etc.

THEORY OF EQUITABLE ESTOPPEL.

At page 35, the Appellees state it is immaterial that Bennett, at the time of the meeting, had no intent to deceive Roberts and was acting entirely in good faith. Appellees then state that in taking the Vitt pledge American was guilty of constructive fraud, and under the doctrine of equitable estoppel was properly prevented by the Court from the misapplication of such assets. In support of its theory of equitable estoppel, the Appellees cite but one case (*Union Oil Company of California v. Lull,* 349 P.2d 243, 250). There are several distinctive features about this case. One is, and we think most important, the indemnitor in this case was not engaged in the indemnity business, whereas Roberts was a professional indemnitor, and, in this instance, received $75,791.46. A compensated indemnitor is not a favorite of the law, and his contract will be construed against him. (*Rose v. Ramm,* 254 Mich. 259, 237 N.W. 60; *Union Paving Co. to use of U. S. Casualty Co. v. Thomas,* 103 F.Supp. 408.) In the *Union Oil* case, which involved a claim by reason of charges made upon a stolen credit card against the owner of the card, the Court stated:

> "In determining the liability of the indemnitor in this case we may consider the fact that *he is not engaged in the indemnity business,* and there-

fore without the opportunity to calculate his risk and charge a premium accordingly." (Emphasis ours.)

Even though this was so, the Oregon Court held that the indemnitor was responsible, the only obligation of the indemnitee being the reasonable inquiry as to the authority of the person who presented the card for services.

Hiern v. St. Paul Mercury Indemnity Co., 262 F.2d 526, is not in point, because in that case the Court emphasized that it based its decision upon a misrepresentation of a fact that was represented to have been done and not a future promise.

In *United States Fidelity & Guaranty Co. v. Putfark,* 158 So. 9, cited by the Appellees, the situation is vastly different than here. In this case, the indemnitor was very active in assisting in the completion of the job and the Court noted in the decision that the indemnitor "had a vital interest in protecting his interest", as distinguished from Roberts' complete inactivity and complete disinterest. In this case, the indemnitee advised the indemnitor he had no further responsibility, whereupon he ceased to become interested. There is no such representation found any place in this record.

Appellees' citation of the *Putfark* case, and their reliance upon equitable estoppel, brings the true picture of Roberts' position before the Court. The *Putfark* case was decided by the Louisiana Supreme Court, which subsequently, in *Fidelity & Deposit Co.*

v. Thiem, 193 So. 496, considered this case. In the *Thiem* case, the indemnitor, as Roberts here, refused and neglected to do anything to protect himself or have any interest in the default of the principal. The indemnified surety was required to pay the loss, and brought suit against the indemnitor to recover under the indemnity agreement. The defendant indemnitor defended on the ground that the surety had acted wrongfully to the prejudice of the indemnitor, relying upon the *Putfark* case. The Court held that the indemnitor, by failing to exercise his rights upon being notified of the default, was estopped to complain of the actions of the surety, and that *Putfark,* if authority for anything, is authority for this position. In describing the obligations of the indemnitor, it is stated:

> "He [indemnitor] did not speak when he should have done so. It is now too late to escape the responsibility which his own silence and action superinduced."

The Court thereupon held that, having so refused and neglected to take any interest in the matter, he was estopped to complain of the surety's subsequent procedure.

It is further interesting to note that Roberts was to be paid under the indemnity agreement (Plaintiffs' Exhibit 1) his premium of 1% of the total job as the job progressed. The total amount of this premium was $75,791.46, which was fully paid as acknowledged by Appellees in their brief at page 12. The job was not complete when Roberts was notified of the de-

fault of the principal, Wise estimating that it might have been 90% complete. (Wise Dep., p. 16.) Under the government contract, as set forth in Exhibit 1, payments were to be made as work was performed, with the usual 10% retainage. When the notice of default was made, Roberts had not earned and was not entitled to payment in the whole amount of the premium charged by him, but was to be paid as payment was made and the job completed. Even though American Casualty Company had to spend over $1,000,000.00 in completing the job, Roberts received, on completion of the job, his entire premium. If there is an estoppel, it applies to Roberts, who received the entire benefits of his contract but now attempts to avoid liability. (*Bryce Plumbing & Heating Co. v. Maryland Casualty Co.,* 21 F.Supp. 854.)

The only thing that Roberts has ever done was to send his attorney and engineer to Amarillo upon receipt of the notice to verify that there was a loss for his own information, and thereafter state that he was financially and physically unable to perform any obligations of his agreement. He did not contact the principals, Stringfellow, Johnson or Vitt; he did not attempt to obtain any assignment of any assets to himself or American from Vitt, even though Vitt was present with his counsel at Roberts' home. He did not at any time express any interest whatsoever in the matter. He refused to guarantee a loan to be obtained by the principals.

It is interesting to note that although Roberts' attorney was fully advised of the Vitt pledge on Oc-

tober 14, 1959 (Brief of Appellees, p. 30) if not advised previously thereto, no action was taken other than a letter by Mr. Anderson (Defendants' Exhibit 10), and no tender of that portion of the premium, which would not have been the whole, was made to anyone. No objection was ever made to Vitt. We think it is reasonable to assume that since the job at that time was only 90% complete that Roberts received and accepted the final payments on his premium after the Anderson letter, at least the same were not due prior to that time. Consequently, if there is any estoppel on the part of anyone in this case, it is that Roberts is estoppped to complain of the contract executed by Mr. Vitt.

Appellees have wholly failed to answer the arguments of Appellants that pledge agreements must be enforced as written and assets pledged to secure one obligation at the direction of the pledgor may not be applied against a different obligation, as set forth in Appellants' Opening Brief; have completely failed to answer or consider that the doctrine of "marshaling assets", referred to by the Court and counsel, is completely inapplicable to the case at bar.

We submit that the Trial Court could not reform the pledge agreement in the absence of all the parties before the Court, and could not change the application of the pledge in this action indirectly as it has done in this case. We further submit that under the laws and statutes of Idaho, interest should be allowed from the date the amount became due, and in no event later than the filing of the complaint, as set out by

Judge Cavanah in *U. S. v. Mitry Bros.,* 4 F.Supp. 216, affirmed in this Court 75 F.2d 79. We submit that insofar as the application of the assets of the pledge is concerned, and the allowance of interest, the judgment is in error, that the judgment in these respects should be reversed with instructions to the Trial Court to revise the judgment by the elimination of the credits of the pledged assets to the indemnitors, Roberts, and to allow interest to plaintiffs from the date of the complaint at the latest.

Dated, Boise, Idaho,
October 25, 1963.

Respectfully submitted,
WILLIS C. MOFFATT of
MOFFATT, THOMAS, BARRETT & BLANTON,
Attorneys for Appellants.

No. 18677

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROBERT I. SAMSING,

Appellant,

vs.

S & P COMPANY, *et al.*,

Appellee.

BRIEF OF APPELLANT.

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No. 18677

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROBERT I. SAMSING,

Appellant,

vs.

S & P COMPANY, *et al.,*

Appellee.

BRIEF OF APPELLANT.

Jurisdictional Statement.

This is an Appeal from a Judgment of Dismissal by the United States District Court for the Southern District of California, of plaintiff's Complaint. The Court's Judgment here appealed from was entered on March 7, 1963.

The action below was instituted by a Complaint filed by plaintiff against S & P Company, doing business as Maier Brewing Company, and Keller Street Development Company, defendants. In its three causes of action, the Complaint alleges that plaintiff was employed by defendants as a long line beer truck driver, and that from 1959 up to and including July 20, 1962, defendants failed and refused to pay to plaintiff, who was an employee in good standing, of driver's local No. 203 of the Teamster's Union, the wages and other

benefits to which he was entitled as an employee of said Union, as called for in various collective bargaining agreements in effect during said period between the plaintiff's said Local and Union, and the defendants and the California Brewers Association, and California Beer Wholesaler's Association, Inc.

Jurisdiction of the United States District Court was invoked under Section 301(a) of the Labor-Management Relations Act, 29 U. S. C., Section 185(a), Notice of Appeal from the District Court's Judgment of Dismissal was filed on April 3, 1963, and thus was timely. This Court's jurisdiction is founded on Title 28 U. S. C. Section 1291.

Statement of the Case.

This action is a suit for wages and other benefits claimed by plaintiff against defendants. During the period of his employment, plaintiff was a member of Local 203 of the Teamster's Union. He was a long line beer truck driver, employed by the defendants who own and operate Maier Brewing Company, manufacturer of beer.

The Complaint alleges three separate causes of action, each of which is identical in the relief sought, namely, money, but each of which covers a different period of time and differs as to the amount of claimed wages.

Starting in June, 1958, and continuing up to June 20, 1962, when plaintiff's employment was terminated, successive collective bargaining agreements were exe-

cuted by and between Teamster's Brewery and Soft Drink Manufacturers Joint Board of California (herein called the "Union"), and certain trade associations representing beer manufacturers such as defendants, namely, the California Brewers Association and California Beer Wholesalers Association, Inc. [R. 3.] The Union acted for and represented drivers such as plaintiff, and the associations above named acted for defendants and for others. This is not an unusual procedure in labor-management collective bargaining negotiations.

The Complaint further alleges that said collective bargaining agreements set forth the amount of mileage rates, regular straight time, hourly rates, loading and unloading rates, rates for mechanical failure, dead-heading pay, lay-over pay and subsistence pay that long line drivers were to receive; that plaintiff was a member in good standing of Local 203; that Local 203 is represented by said Union and "is included in the purview of its labor agreement with defendants". The Complaint also alleges that said labor agreements were negotiated and executed for the benefit of plaintiff and others similarly situated. [R. 3.]

Each cause of action of the Complaint alleges that defendants failed and refused to pay to plaintiff the wages and other payments he should have received according to said agreements, that he exhausted all of his administrative remedies provided for in said agreement, or that he has attempted to so comply. [R. 4.]

The Complaint alleges a total wage loss to plaintiff of $9,126.26 for the three causes of action. [R. 7.]

Defendants moved to dismiss on the ground that the District Court had no jurisdiction of the action, and on the further ground that the Complaint failed to state a claim upon which relief could be granted. [R. 10-11.] The motion was made on the Complaint alone, without supporting affidavits.) The Court granted defendants' motions, not on the grounds stated in defendants' motion, but on its own initiative, on the ground that "it appears upon the face of the Complaint and the attached by-laws, that the plaintiff has not exhausted the administrative remedies before the Union". [R. 14.]

Specification of Errors Relied On.

1. The District Court erred in dismissing the Complaint upon the grounds stated, namely, "that it appears upon the face of the Complaint and attached by-laws that plaintiff has not exhausted the administrative remedies before the Union".

2. The District Court erred in dismissing the Complaint on any grounds.

3. The District Court erred in failing to rule on defendants' Motion attacking the Court's jurisdiction.

Questions Presented.

1. If a Complaint alleges that the plaintiff exhausted all of his administrative remedies, or that he attempted to do so, and the exhibits attached to the Complaint contained copies of the collective bargaining agreement affecting plaintiff's rights, which patently do not apply to the situation, does the District Court commit error in dismissing the Complaint upon the ground that it appears upon the face of the Complaint and attached by-laws that plaintiff has not exhausted the administrative remedies before the Union?

2. Does the District Court commit error when it dismisses a Complaint and orders Judgment of Dismissal, without allowing plaintiff a right to amend?

3. Does a District Court have jurisdiction of a suit by a wage earner against his former employer for wages under Section 301a of the Labor Management Relations Act?

4. Does a District Court commit error when it dismisses a Complaint upon a ground not urged by defendants (other than lack of jurisdiction), but upon a ground raised by the Court of its own initiative?

5. Does a District Court commit error when it fails to rule upon its own jurisdiction when that point is raised by the defendants' Motion to Dismiss?

ARGUMENT.

Summary of Argument.

The Complaint specifically and clearly alleges that plaintiff exhausted his administrative remedies and there is nothing in the attached exhibits to contradict said allegation, and it was therefore error for the District Court to dismiss the Complaint on that ground. Furthermore, if the District Court felt that said allegation was not precise enough, or was legally insufficient, it should have allowed plaintiff to amend. The defendants urged the dismissal on the ground that the Court had no jurisdiction and that the Complaint did not state a claim upon which relief could be granted. Plaintiff urged that the Court had jurisdiction under Section 301(a) of the Labor Management Relations Act, but the Court failed or refused to pass upon that point and urged the stated point of no exhaustion of administrative remedies. Furthermore, the Court should have considered and ruled upon the question of jurisdiction and should have sustained the Court's jurisdiction here. The Court should not have raised a point on its own initiative.

I.

The District Court Should Not Have Dismissed the Complaint on the Ground That Plaintiff Had Not Exhausted His Administrative Remedies.

Each of the three causes of action alleges that plaintiff exhausted his administrative remedies or that he attempted to do so. Attached to the Complaint are copies of the collective bargaining agreements that cover plaintiff's rights. The District Court erroneously refers to exhibits as "bylaws". [R. 14.] Section

29 of the collective bargaining agreement, 1960-1962, on page 66 thereof, sets forth the machinery for the adjustment of disputes. The machinery for settlement of grievances is not important here.

Whether plaintiff did or did not seek exhaustion of his administrative remedies is a matter for plaintiff to prove at the trial. It is a question of fact. Defendants presented no affidavits in support of their Motion to Dismiss to contravene plaintiff's allegations. It is not the province of the District Court Judge to raise questions of plaintiff's proof in said Motion.

No matter how likely it might seem, that the plaintiff will be unable to prove his case, he is entitled, upon averring a claim, to an opportunity to try to prove it.

John E. Weinrich v. Retail Credit Co., etc., 186 F. Supp. 392;

Continental Colleries, Inc. v. Shober. Jr., 130 F. 2d 631, 635;

Kirke v. Texas Co., 186 F. 2d 643.

Under the Federal Rules of Civil Procedure, in weighing the validity of a Motion to Dismiss, the duty of the Court is not to test the final merits of the claim in order to determine which party is to prevail, but the duty of the Court rather is to consider whether in the light most favorable to plaintiff, and with every intendment regarded in his favor, the Complaint is sufficient to constitute a valid claim.

Tahir Erk v. Glenn L. Martin Co., 116 F. 2d 865;

John Walker & Sons, Ltd., v. Tampa Cigar Co., Inc., 197 F. 2d 72.

Where a bona fide Complaint is filed, that charges every element necessary to recovery, summary dismissal of a civil case for failure to set out evidential facts can seldom be justified, since a party has a right to call for more facts under the Federal rules, if needed.

> *United States v. Employing Plasterer's Association of Chicago, et al.,* 347 U. S. 186, 189, 74 S. Ct. 452, 98 L. Ed. 618.

The well pleaded allegations of the Complaint must be taken as true under a motion to dismiss.

> *Dawson v. Delaney,* 189 F. Supp. 416.

In the *Dawson* case, *supra,* defendants moved for a dismissal, for the reason that plaintiffs failed to exhaust their remedies under the constitution of the International Union. The Court said on page 418:

> "(5) Next, the defendants move for dismissal for the reason that the plaintiffs have failed to exhaust their remedies under the Constitution of the International Union. At this stage of the proceeding, little need be said about this argument, because, on a motion of this sort, the well-pleaded allegations of the complaint must be taken as true. The last portion of paragraph 20 of the amended complaint is as follows:
>
> '* * * An appeal was taken by the local from the said order to the General Executive Board, but the said board has failed to hold any hearing and has advised the local's representatives that they will not be permitted the right of counsel when such a hearing is held in the future. A true and correct copy of the appeal filed with the General Executive Board from the

order invoking supervision is hereto attached and marked Exhibit 1.'

"Inasmuch as this allegation is not formally controverted, it must be taken as true, at least for the present. Moreover, it is perhaps desirable that, aside from this particular point, the plaintiffs be permitted to introduce evidence at trial from which it may or may not appear that they can bring themselves within one or more of the exceptions to the rule requiring that, before instituting court action, complainants must first exhaust all administrative remedies provided in the Union charter."

II.

The District Court Should Have Allowed Plaintiff to Amend His Complaint.

Assuming, without admitting the fact, that there was a defect on the face of the Complaint, the Court below should have allowed the plaintiff to amend, even though no such request was made by plaintiff.

In order to justify a dismissal of a Complaint for insufficiency, it must appear as a matter of law that under no state of facts which could be proved in support of the claims pleaded, would the plaintiff be entitled to any relief.

Dutton, et al. v. Cities Service Defense Corporation, 197 F. 2d 458;

Local 149 Boot & Shoe Workers Union, etc. v. Faith Shoe Company, 201 F. Supp. 234;

Hughes v. Local 11 International Association of Bridge, etc., 287 F. 2d 810;

Mitchell v. E-Z Way Towers Inc., 269 F. 2d 126.

If the District Court was correct in its statement that it is apparent on its face that plaintiff has not exhausted his administrative remedies, perhaps plaintiff could allege in more detail, if required, what he did to exhaust said remedies. This would certainly allow the matter to be tried on the merits. But again there is nothing on the face of the complaint and the attached exhibits that support the trial court's ruling which was clearly erroneous.

Perhaps the Court confused a motion to dismiss for failure to state a claim under Federal Rules of Civil Procedure 12(b), with a motion for a more definite statement under Rule 12(e). The Court, in the *Mitchell* case, *supra,* quoting from *Conley v. Gibson,* 355 U. S. 41, 78 S. Ct. 103, at page 130 of 269 F. 2d said:

> ". . . the federal rules of civil procedure do not require a claimant to set out the facts upon which he bases his claim. To the contrary, all the rules require is a 'short and plain statement of the claim' that will give . . . notice of what the plaintiff's claim is, and the grounds upon which it rests."

Rule 15(a) of the Federal Rules of Civil Procedure provide that leave of Court to amend be freely given when justice so requires.

Fuhrer v. Fuhrer, 292 F. 2d 140;
McHenry v. Ford Motor Co., 269 F. 2d 181;
Kingwood Oil v. Bell, 204 F. 2d 8, 13.

III.

The District Court Has Jurisdiction Under Section 301(a) of the Labor-Management Relations Act.

Plaintiff alleges in his Complaint for wages and for breach of the collective bargaining agreements that the District Court has jurisdiction under Section 301(a) of the Labor-Management Relations Act. This was disputed by defendants and was one of their grounds of attack of the complaint.

Section 301(a) of the Labor Management Relations Act, 1947, 29 U.S.C., Section 185(a) reads as follows:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this act, or between any such labor organizations, may be brought in any District Court of the United States having jurisdiction of the parties, without regard to the amount in controversy or without regard to the citizenship of the parties."

It is obvious that this Section confers jurisdiction on the District Court of plaintiff's suit. The collective bargaining agreement was made for the benefit of plaintiff and other members of the Union and this is a suit for violation of said contract. The point was clearly stated and settled by the United States Supreme Court in the recent case of *Doyle Smith v. Evening News Assn.*, 371 U. S. 195, 83 S. Ct. 267, decided December 10, 1962. This case supports plaintiff's position here and states that the District Court has jurisdiction.

See also:

Local 174 Teamster's, etc. v. Lucas Flour Company, 369 U. S. 95, 82 S. Ct. 571, 7 L. Ed. 2d 593;

Charles Dowd Box Co. v. Courtney, 368 U. S. 502, 82 S. Ct. 519, 7 L. Ed. 2d 483;

Atkinson v. Sinclair Refining Company, 370 U. S. 238, 82 S. Ct. 1318, 8 L. Ed. 2d 462.

IV.

The District Court Commits Error When It Dismisses a Complaint Upon a Ground Not Urged by Defendants.

The defendants moved to dismiss because of lack of jurisdiction of the District Court under Section 301(a) of the Labor Management Relations Act, *supra,* and because the Complaint does not state a claim upon which relief can be granted. Counsel for the defendants urged these points in his argument, but the Court, although it may have considered them, based its ruling upon an entirely different point, namely, failure to exhaust administrative remedies. The Court erred in raising this point on its own initiative.

Roloff v. Perdue, 31 F. Supp. 739.

In this case the Court said on page 743:

". . . may the Court on its own motion dismiss the complaint on the broad ground of "failure to state a claim upon which relief can be granted"?

"Now, it is true that under Rule 12(b) of the Rules of Civil Procedure, 28 U.S.C.A. following section 723c, this defense may be asserted by motion

'at the option of the pleader.' I incline to the opinion, however, that the Court, at least in the circumstances here present, cannot assert the defense on its own motion. Such procedure would deprive the plaintiffs of their right to amend, if per chance amendment is found feasible. I am, therefore, constrained to the conclusion that the defendants' motion to dismiss must be overruled . . .".

V.

The District Court Should Have Passed Upon the Question of Jurisdiction When Raised by the Defendants.

The defendants' Motion to dismiss attacked the Court's jurisdiction, but the Court failed to rule on this point. This is error.

Federal Rules of Civil Procedure, Sec. 12(h), 28 U.S.C. provides:

> "Whenever it appears by suggestion of the parties or otherwise, that the Court lacks jurisdiction of the subject matter, the Court shall dismiss the action . . ."

Ambassador East v. Orsatti, Inc., 155 F. Supp. 937, 938;

Page v. Wright, 116 F. 2d 449, 453.

So long as the question of the Court's jurisdiction was raised and argued by the defendants, the plaintiff was entitled to a ruling in order to get this question disposed of and foreclose the possibility of the Court's

jurisdiction being attacked at a later time, to the waste of time of the parties and of the court.

Wherefore, appellant respectfully requests that this Court reverse the decision of the District Court.

Respectfully submitted,

ERWIN MORSE,
Attorney for Appellant.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ERWIN MORSE

No. 18677

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROBERT I. SAMSING,

Appellant,

vs.

S & P COMPANY, *et al.*,

Appellees.

BRIEF FOR APPELLEES.

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Appellees.

BRIEF FOR APPELLEES.

Appellant's "Statement of the Case" is substantially correct as far as it goes, but in appellees' view it is not quite complete. Appellees therefore submit the following.

Supplementary Statement of the Case.

Appellant's complaint herein set forth purported wage claims arising under three successive collective bargaining agreements covering the years 1958-1960, 1960-1962, and 1962-1964. Copies of the 1960-1962 and 1962-1964 agreements are attached to the complaint, marked Exhibits A and B respectively and by reference incorporated therein. No copy of the 1958-1960 agreement was attached, but it was alleged that that agreement "is similar to the 1960-1962, and the 1962-1964 agreements," copies of which were attached.

Each of the labor agreements pleaded prescribed a comprehensive scheme for the submission, negotiation,

and arbitration of "any dispute or grievance arising at or involving an establishment subject to this Agreement:" Complaint, Exhibit A, Sec. 29, pp. 66-71, and Exhibit B, Sec. 29, pp. 61-65.

With respect to compliance with the contract grievance procedure the complaint alleged only "That plaintiff has exhausted all of the administrative remedies provided for in said labor agreement or he has attempted so to comply."

At the argument on appellees' motion to dismiss, appellees' counsel pointed out that the contracts pleaded provided a grievance procedure and that appellant's allegation respecting compliance with it was "a pure conclusion on the part of the pleader." [Rep. Tr. pp. 4-5, 11, 13-14.][1]

After referring to the "many, many attempts of union men to bypass the administrative setup" the District Court stated that "Where it appears or even if there is doubt they have exhausted the remedy I feel it is the duty of the Court to hold the integrity of the contract". [Rep. Tr. p. 12.]

Although thus put on notice by remarks of both the Court and counsel that the matter of compliance with the grievance procedure was questioned, particularly in reference to the sufficiency of appellant's pleading in that respect, appellant's counsel nevertheless evinced

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[1]Appellees' counsel also stated as matter of fact that there had been no compliance with the grievance procedure [Rep. Tr. p. 12]. While this was outside the record and the District Court did not rely on it [Rep. Tr. p. 14] it showed that appellees' contention was a serious one and not a mere quibble concerning pleading, and it should have indicated to appellant's counsel the advisability of pleading facts if he had any; moreover, appellant's counsel did not challenge the statement.

the intention to stand on his pleading as written. [Rep. Tr. p. 13.] He did not indicate that there were any facts upon which to base an amendment so as to lay at rest the serious question which had been raised. Nor did he announce any intention of amending or ask leave to amend, either before or after the Court indicated that the motion to dismiss would be granted.

At the conclusion of the hearing on the motion to dismiss February 25, 1963, the Court announced that the motion to dismiss would be granted on the ground that it appeared on the face of the complaint that appellant had failed to exhaust his contract administrative remedies. [Rep. Tr. p. 14.] Judgment of dismissal was not entered until March 7, 1963. [R. p. 20.] Appellant made no motion to set aside the judgment; instead, he filed the present appeal. In his brief on appeal (p. 9) appellant for the first time mentioned the possibility of amending his complaint; he asserted that "the Court below should have allowed the plaintiff to amend, even though *no such request was made by plaintiff.*" (Emphasis supplied.)

Summary of Argument.

I.

Where it is made to appear that a labor contract sued on provides a grievance procedure applicable to the claim involved, a Federal district court does not have jurisdiction to entertain the claim unless and until the contract remedy has been exhausted. Where the complaint discloses the existence of such a remedy, it is incumbent on the plaintiff to show that he has complied with it, and a mere conclusionary allegation is insufficient. The motion to dismiss was properly granted and judgment of dismissal thereon was correct.

II.

It is not true that the District Court dismissed the action on its own motion; appellees moved for dismissal (although initially for different reasons) and at the argument pointed out the deficiency in the complaint. In any event, the District Court was authorized to dismiss the action for want of jurisdiction, either at the suggestion of a party or on its own motion.

III.

Appellant did not amend his complaint, although he could have done so as of right at any time until the judgment of dismissal was entered. And after the judgment was entered he did not move, as he could have done, to set it aside so that he could then ask leave to amend. Instead, he chose to stand on his pleading as written and appeal from the judgment. The District Court was not obliged to invite or suggest an amendment. Appellant is mistaken in his assertion, made for the first time on appeal, that the District Court should have granted him leave to amend despite his failure to request the same.

ARGUMENT.

I.

The Action Was Properly Dismissed for Want of a Sufficient Showing That Appellant Had Exhausted His Remedy Provided by the Contracts Which He Pleaded and Sued On.

This action was purportedly brought under Section 301 of the Labor-Management Relations Act, 1947 (29 U. S. C. A., Sec. 185 (a).) Without regard to that law it has been uniformly held that the Federal courts will not entertain a claim under a labor contract which provides an applicable grievance procedure unless and until the contract remedy is exhausted—at least in States (like California) where the local law so provides: *Transcontinental & Western Airlines v. Koppal,* 345 U. S. 653; *Barker v. Southern Pacific Co.* (C. A. 9), 214 F. 2d 918; *Jacobson v. Luckenbach S.S. Co.* (D. C., Ore.), 201 F. Supp. 883, 889. Such is the law in California: *Cone v. Union Oil Co.,* 129 Cal. App. 2d 558, 564, 277 P. 2d 464, 468.

Actions under Section 301, Labor-Management Relations Act, 1947, are governed by Federal law, which may embrace State law where consistent: *Textile Workers Union v. Lincoln Mills,* 353 U. S. 448, 456-457; *Local 174 v. Lucas Flour Co.,* 369 U. S. 95, 103.

Federal law and policy favor the arbitration of grievances. For example, in *Drake Bakeries, Inc. v. Local 50,* 370 U. S. 254, 263, it is said:

> In passing §301, Congress was interested in the enforcement of collective bargaining contracts since it would "promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace" (S. Rep. No. 105,

80th Cong., 1st Sess. 17). It was particularly interested in placing "sanctions behind agreements to arbitrate grievance disputes" (*Textile Workers Union v. Lincoln Mills,* 353 U.S. 448, 456.) The preferred method for settling disputes was declared by Congress to be "final adjustment by a method agreed upon by the parties" (§203(d) of the Act, 29 U. S. C. §173(d)). "That policy can be effectuated only if the means chosen by the parties for settling their damages under the collective bargaining agreement is given full play." (*United Steelworkers v. American Mfg. Co.,* 363 U. S. 564, 566.)

In line with that national policy, it has been held that the exhaustion of labor contract remedies is a jurisdictional prerequisite to suit. Thus, in *Evans v. Hudson Coal Co.* (C. A. 3), 165 F. 2d 970, 972-973, it was held that a motion for stay pending arbitration was properly made under Rule 12(b)(1), Federal Rules of Civil Procedure, which permits the defense of want of subject-matter jurisdiction to be made by motion, and the court said that pending arbitration the district court was "deprived of jurisdiction of the subject matter."

In *Arnold v. L. & N. R.R.* (D. C., Tenn.), 180 F. Supp. 429, it was said that ". . . the Court is . . . without jurisdiction because the parties have not exhausted the administrative remedies provided for in the Memorandum of Agreement"

Accord: United Mine Workers v. Roncco (D. C. Wyo.), 204 F. Supp. 1, 4.

Until recently it was held that §301, Labor-Management Relations Act, 1947, did not authorize actions

brought to assert employees' individual rights under labor contracts: *Assn. of Westinghouse etc. Employees v. Westinghouse Electric Co.,* 348 U. S. 437. On this point, the Supreme Court reversed itself at the last term: *Smith v. Evening News Assn.,* 371 U. S. 195, holding that employees may sue under §301 to assert at least certain kinds of contract claims. But the Supreme Court was careful to point out (in footnote 1) that in that case "There was no grievance arbitration procedure in this contract which *had to be exhausted before recourse could be had to the courts.*" (Emphasis supplied.) Thus, the jurisdiction of the Federal courts to entertain individual employee claims under §301 is limited by the requirement of exhaustion of grievance arbitration procedures—a requirement previously recognized as being a limitation on §301 jurisdiction.

Appellant's complaint disclosed the existence of a comprehensive contract grievance arbitration procedure. In order to invoke the jurisdiction of the Federal courts he was therefore required to show that he had exhausted that procedure. What he did was merely to allege "That plaintiff has exhausted all of the administrative remedies provided for in said labor agreement or he has attempted so to comply." This was a mere conclusion, wholly uninformative as to what he claimed to have done to comply or attempt to comply.

Appellees' motion to dismiss admitted only well-pleaded allegations of the complaint, not legal conclusions (2 Moore's Federal Practice, 2d ed., §1208; *Newport News Shipbuilding etc. Co. v. Schauffler,* 303 U. S. 54, 57) or inferences or conclusions of fact not supported by allegations of specific facts upon which the inferences or conclusions rest (*Homan Mfg. Co. v.*

Russo (C. A. 7), 233 F. 2d 547, 550; *Weeks v. Denver Tramway Corp.* (C. A. 10), 108 F. 2d 509, 510.)

> "A pleading which sets forth a claim for relief . . . shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief . . ."
>
> **Rule 8(a) Federal Rules of Civil Procedure.**

Federal pleading under Rule 8(a) is supposed to be simple, as indeed it usually is. But it is a mistaken "view that the rule does not require the averment of any information as to what has actually happened . . . Rule 8(a) envisages the statement of circumstances, occurrences, and events in support of the claim presented . . ." (October 1955 Report of the Advisory Committee on Civil Rules, Note to Rule 8(a)(1), quoted at page 655, Moore's Federal Practice, Civil Rules and Official Forms as amended 1963, with Comments.)

Where, as here, the jurisdiction of the District Court depended on appellant's exhaustion of his contract remedy, it was incumbent on appellant to allege facts to show that the court had jurisdiction. But appellant did not do so, although the deficiency in his complaint was repeatedly called to his attention. The District Court was right in stating that "even if there is doubt they have exhausted the remedy I feel it is the duty of the Court to hold the integrity of the contract". [Rep. Tr. p. 12.] In these circumstances the motion to dismiss was properly granted and judgment of dismissal was correct.

II.

The Court Did Not Dismiss the Action on Its Own Motion, Although It Could Properly Have Done So.

Appellant asserts that the District Court erred in raising on its own initiative the point of failure of exhaustion of the contract grievance arbitration procedure.

As mentioned above, appellees' counsel first pointed out that appellant's allegation with respect to exhaustion of the contract remedy was a pure conclusion. [Rep. Tr. p. 5.] The District Court did not act on its own initiative. But it would have been perfectly proper for it to have done so.

As stated above, exhaustion of the contract grievance arbitration procedure was a jurisdictional prerequisite. The District Court properly concluded that appellant's pleading was not sufficient to invoke the Court's jurisdiction. Rule 12(h), Federal Rules of Civil Procedure, provides: ". . . whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Thus, the court had not only the right but the duty to dismiss for want of jurisdiction. In *Tipton v. Bearl Sprott Co.* (C. A. 9), 175 F. 2d 432, 436-437, this Court said:

> ". . . the third amended complaint failed to state a claim of which the District Court had jurisdiction. It should have dismissed on that ground. That the District Court's jurisdiction was not challenged is immaterial."

III.

Appellant Did Not Choose to Amend; the District Court Did Not Deny Him Leave to Do so; and It Did Not Err in Failing to Invite Him to Do So.

Appellant admits that he did not ask leave to amend his complaint, yet he complains that "The Court below should have allowed the plaintiff to amend." (Brief for Appellant, p. 9.) Since appellant did not ask leave to amend, there was no denial of such leave. We do not understand appellant's contention in this respect, unless he means to claim that the District Court should have invited or suggested an amendment. If so, the following language from *Keene Lumber Co. v. Leventhal* (C. A. 1), 165 F. 2d 815, 823, is particularly applicable:

> Rule 15(a) permits a party to amend his pleadings "once as a matter of course at any time before a responsive pleading is served." We take it that a motion to dismiss is not a "responsive pleading" within the rule . . .; and that, therefore plaintiff might have amended its complaint as a matter of right at any time before the District Court entered its judgment dismissing the complaint. There was ample opportunity to do so, for several weeks elapsed between the filing of the motions to dismiss and the judgment of dismissal. It does not appear that the plaintiff at any time indicated to the District Judge a desire or intention to amend. After the judgment of dismissal had been entered, it was too late for the plaintiff to amend as a matter of right, but application might have been made to the District Court for discretionary re-

> lief from the judgment under Rule 60(b), asking that the judgment be set aside, in order to permit the filing of an amended complaint which, by mistake or excusable neglect, the plaintiff had previously failed to do . . . The record does not indicate that any such motion was presented to the District Judge. Under the circumstances we do not think that the Judge had a duty to take the initiative of suggesting or inviting an amendment.

By appealing rather than amending before judgment or thereafter asking to have the judgment set aside and to be granted leave to amend, appellant chose to stand on his original complaint, which is insufficient. His suggestion for amendment, heard for the first time on appeal, is untimely.

Conclusion.

It is submitted that appellant's complaint did not sufficiently allege exhaustion of his contract grievance arbitration procedure so as to invoke the jurisdiction of the District Court, that the motion to dismiss was properly granted, that the District Court did not err in giving judgment of dismissal, and that the judgment should be affirmed.

Respectfully submitted,

MURRAY M. CHOTINER,
Attorney for Appellees.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

MURRAY M. CHOTINER,
Attorney for Appellees.

APPENDIX.

Statutes and Rules.

§301, Labor-Management Relations Act, 1947 (29 U.S.C. §185(a))

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Rule 8(a), Federal Rules of Civil Procedure

A pleading which sets forth a claim for relief . . . shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends . . ., (2) a short and plain statement of the claim showing that the pleader is entitled to relief . . .

Rule 12, Federal Rules of Civil Procedure

. . . (b) . . . the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter . . . (6) failure to state a claim upon which relief can be granted . . .

. . . (h) . . . (2) . . . whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action . . .

Rule 15(a), Federal Rules of Civil Procedure

(a) A party may amend his pleading once as a matter of course at any time before a responsive pleading is served . . .

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 18678

JOHN W. WHALEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court
Southern District of California
Southern Division

APPELLANT'S REPLY BRIEF

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No. 18678

JOHN WILLIAM WHALEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF

I.

JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of the United States District Court for the Southern District of California adjudging appellant to be guilty as charged in an indictment following a jury trial. The offense occurred in the Southern Division of the Southern District of California; the District Court had jurisdiction by virtue of Title 18, United States Code, Section 3231. This Court has jurisdiction to entertain this appeal from the judgment under Sections 1291 and 1294 of Title 28, United States Code.

ARGUMENT

A. The Trial Court Erred In Its Instructions

Respondent claims that the instructions given by the Court were clear and unambiguous.

For some unknown reason, the record does not show that the Court in its chambers advised both the Assistant U. S. Attorney and Defense Counsel that it was not necessary to furnish him (the Court) with instructions, as the Court usually disregards said instructions and gives his own. At no time was Appellant given the opportunity to object to the instructions given by the Court,as said Court instructed the jury "off the cuff" without any notes or memo that was visible to Counsel. Therefore, it was extremely difficult, if not impossible, to object to the instructions given to the jury as required by Rule 30, 18 U.S.C.A.

The Defense contends that what has been stated above is, in fact, the truth. Secondly, instructions are given for the purpose of aiding the jury in arriving at their conclusion. It is quite clear that the instructions must be unambiguous and clear in order that the jury may understand what is being stated. There is a great deal of authority for this and Appellant will not presume upon this Court to state these general rules of law and the citations therefor. There are cases that hold that when an erroneous instruction is given, the giving of an additional instruction has cleared the record. However, in the light of the instructions given in the herein case, Appellant contends that they were so contradictory and so ambiguous that a jury comprised of reasonable men and women could not adequately follow same, particularly in the light of the crucial issues herein; namely, "the duty of a Defendant in the case of false representations."

The theory of the Defendant in a trial must be stated to the jury by Court in its instructions clearly and completely.

MAYNARD v. UNITED STATES, 215 F.2d 336.

Appellant contends that the instructions given to the jury, particularly the last instruction which was given to the jury after they were already deliberating was prejudicial to the Appellant.

B. The Conditions Of Probation Were Unreasonable

The Appellant is an ex-police officer who is engaged in the repossession business for the last eleven years. This is his sole means of making a living. At the time that he was repossessing automobiles on behalf of Pacific Coast Claims Adjusters, he was also employed by a private detective agency known as the National Bureau of Investigation. It was his contact with this second business that Appellee got him into trouble, i.e., using the name National Bureau of Investigation. This case is not similar to Federal cases cited wherein the Appellant was engaged in an unlawful business such as bookmaking, gambling, etc. Appellant has continued to conduct his business up to the present moment without complaint of any sort. Therefore, it is contended that notwithstanding the fact the Court has the power to use reasonable methods as a condition of probation to prevent a person from conducting a particular business, the imposition in the herein case restricting Appellant WHALEY from continuing in the repossession business is unjust, unreasonable, and can only deprive him and his family of a living in which the Appellant has worked for many years.

It is therefore respectfully alleged that the condition of the probation herein

restricting Appellant from working in his repossession business should be modified. The Court sentenced the Appellant and after the sentencing was completed, the U. S. Attorney requested the Court to insert this additional condition, which the Court granted.

III.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the verdict of guilty in the Court below should be reversed.

Respectfully submitted,

ROCK ZAITZOW,

Attorney for Appellant

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROCK ZAITZOW

Attorney for Appellant.

No. 18678

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN WILLIAM WHALEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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TABLE OF AUTHORITIES CITED

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JOHN WILLIAM WHALEY,

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APPELLEE'S BRIEF.

I.

JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of the United States District Court for the Southern District of California adjudging appellant to be guilty as charged in an indictment following a jury trial. The offense occurred in the Southern Division of the Southern District of California; the District Court had jurisdiction by virtue of Title 18, United States Code, Section 3231. This Court has jurisdiction to entertain this appeal from the judgment under Sections 1291 and 1294 of Title 28, United States Code.

II.
STATEMENT OF THE CASE.

The indictment in one count which is set forth as Appendix A charges appellant with impersonation of an agent of the Federal Bureau of Investigation, in violation of Title 18, United States Code, Section 912. Appellant was tried before a jury on September 25, 26 and 27, 1962, and a verdict of guilty was returned. [C. T. 16.][1] On October 5, 1962, appellant was sentenced to three years imprisonment and execution of sentence was suspended and defendant placed on probation for a period of five years. [C. T. 20.] Appellant filed a timely notice of appeal. [C. T. 22.]

III.
ERROR SPECIFIED.

Appellant has in effect specified the following points on appeal:

1. The evidence is insufficient to support a conviction.
2. The trial court erred in its instructions, "which resulted in prejudice to the appellant."
3. The trial court erred in admitting evidence of prior similar acts of appellant.

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[1]C. T. refers to Clerk's Transcript of Record.

IV.

STATEMENT OF FACTS.

Government's Case in Chief.

Robert Reedy testified that he was living at 1001 Euclid Avenue, San Diego, California, on March 13, 1962, when he answered the door of his residence about noon and observed the appellant who asked him if this was where Mr. Durbin lived. [R. T. 5, 6.][2] Upon being advised by Reedy that Mr. Durbin was not there the appellant stated that he was "a special investigator." [R. T. 6.] Reedy asked what it was that Whaley wanted and if he had come about the car of Reedy's father-in-law, John Durbin, whereupon, appellant stated that he hadn't come about repossession of the car and asked Reedy if he knew where he could get ahold of Mr. Durbin. [R. T. 6, 7.] Reedy then told Whaley that he didn't know where Mr. Durbin was, "but that even if I did know, that I wouldn't tell him regardless." [R. T. 7.] Mr. Reedy then left the door and his wife came to the door and Mr. Reedy heard her tell the appellant to come in, that she would discuss the matter further but that she wouldn't guarantee that she could tell him anything. [R. T. 7.] Appellant then entered the house and all three parties sat in the front room, at which time appellant asked Mr. Reedy if he knew it was a Federal crime to transport a car across the State line. Mr. Reedy responded by stating that the place where Mr. Durbin bought the car knew that Durbin worked for the Federal Government. [R. T. 7, 8.] Appellant then stated that the place where Durbin had

[2]R. T. refers to Reporter's Transcript of Proceedings.

bought the car "had turned the matter over to us," whereupon, Mr. Reedy asked Whaley for his credentials and the appellant handed Reedy a leather folder in which he observed a gold badge, the details of which he did not remember, and a card about 2½ inches wide by 3½ inches in which Whaley's picture appeared in the lower left hand corner. The card also had Whaley's name, address, height, color of eyes, typed in and at the bottom of the card it had "Federal Bureau of Investigation." [R. T. 9, 10.] Exhibit 1 was identified as being similar in size but not being the card which the witness was shown by appellant. While Reedy had the card in his hands he told his wife that "The gentleman was from the FBI and that we might as well tell him, because regardless he was going to find out." Appellant said nothing in response to that statement. Appellant prior to this time had asked Reedy if he and his wife knew they could get into trouble by withholding information. [R. T. 12.] Mrs. Reedy then took from her husband the folder presented by Whaley, looked at the contents, returned same to Whaley and then left the room and obtained a letter which had Durbin's post office box address on it which she then related to appellant. [R. T. 12, 13.]

Upon obtaining this information appellant left and as he was leaving Mrs. Reedy asked how he would contact Durbin, in answer to which Whaley said "they" would send him a telegram and have him get in touch with "our" office, adding that by the time "we" get in touch with people in cases like this "the charges are dropped." [R. T. 12, 13.] At the time Mr. Reedy requested his wife to obtain this information for ap-

pellant, Reedy believed Whaley to be an FBI agent and would not have requested or allowed this information to be given had he not held this belief. [R. T. 14.]

On cross-examination Reedy stated he first felt appellant was a private detective and that he was there for the purpose of repossessing Mr. Durbin's car, but that after appellant stated he was not there about repossessing the car Reedy allowed his wife to invite appellant into their home to find out what it was all about. [R. T. 17-19, 21, 22.] Reedy reiterated that after entry into their home appellant asked if Reedy and his wife knew it was a Federal crime to transport a car across the State line without permission from the owners; that one could get into trouble for withholding information, and that Whaley had said nothing about the legal title holder repossessing the car. [R. T. 24, 25, 28.]

Mrs. Roberta Reedy was at her residence on March 13, 1962, when she went to the door of her house where her husband was conversing with appellant about her father, John Durbin. [R. T. 68, 69.] She remained at the front door with the appellant after her husband left the door, about to close it when appellant displayed a badge and she let him in. [R. T. 69.] Mrs. Reedy thereafter examined a folder in her house produced by appellant after he entered and heard her husband state that appellant was an FBI agent. [R. T. 69.] Appellant stated that Mrs. Reedy had better tell him what he wanted to know or they would get into trouble; they talked the situation over and thereafter she found a letter with her father's post office address on it and gave it to appellant believing at that time

that he was an agent of the FBI, which information she would not have given him had she not held that belief. [R. T. 70.]

On cross-examination Mrs. Reedy stated that she observed the folder which Mr. Whaley had shown her husband and saw a card. [R. T. 73.] All she remembered on the badge was big print saying detective and she recalled that the card was about three inches by three inches with appellant's picture in the lower left hand corner, but she did not recall the wording on the card. [R. T. 74, 75.] She stated that the card which appellant had shown her was different than the card [Ex. 1] later found in appellant's possession. [R. T. 52, 75.] Mrs. Reedy testified that Mr. Whaley stated that her father had taken the car out of the State of Oregon, that it was a crime and he Whaley had been assigned to the case. [R. T. 85.] On redirect examination she testified that after she heard her husband say that appellant was an FBI agent she did not hear the defendant say anything as to whether he was or was not an FBI agent. [R. T. 90.]

A letter [Ex. 6] *re* John J. Durbin dated March 13, 1962, was mailed from appellant to the United States National Bank, Eugene, Oregon, together with an invoice [Ex. 7] entitled Pacific Coast Adjusters to said bank in the sum of $15.00. A check [Ex. 8] in the amount of $15.00 was issued by said bank to Pacific Coast Claim Adjusters which was cashed in the due course of business. [R. T. 145, 146, 147.] The letter [Ex. 6] over the name Jack Whaley included among other things the information that Durbin had not been in San Diego since Christmas of 1961; that Durbin

worked for the U. S. Bureau of Land Management, normally out of the Portland office; that Durbin told his daughter he as going to be working out of Sacramento, and that Durbin's "daughter forwards mail to subject to Post Office Box No. 734 in Marysville, California."

Special Agent Lawrence Feldhaus of the Federal Bureau of Investigation saw appellant at latter's office in San Diego, on June 27, 1962, at which time appellant said he couldn't remember seeing the Reedys on the previous March 13, or, after looking through his files, remember any case on John C. Durbin. [R. T. 39-41.] Agent Feldhaus then asked what identification appellant was carrying at that time and Whaley produced a business card bearing the initials "NBI" stating he could not recall what he had carried on the previous particular occasion because he worked under several different names for several different companies and had used the names of Dealer's Adjustment Bureau, Pacific Coast Claims Adjusters, as well as the National Bureau of Investigation. [R. T. 41-43.] Agent Feldhaus asked Whaley if he still had the badge which he used to carry, and appellant advised that a California Court decision in January made it illegal for repossessors to carry a badge in repossessing an automobile and that he no longer carried that badge, that he thought the badge was home but didn't know where it was and declined to make it available for viewing. [R. T. 43, 44.] When Whaley was asked about carrying a yellow identification card in a badge holder with his badge, he stated he had carried this on occasions, but that he didn't have it with him now, and didn't know just exactly where it was. [R. T. 44.] Ap-

pellant produced a blank yellow card which he said was just like his except that "his was filled out and had a picture on it." [R. T. 44.] This card appeared the same as Exhibit 1 without the typing and picture. [R. T. 45.] Agent Feldhaus exhibited his credentials to appellant who stated the credentials which he had carried were similar to those carried by Agent Feldhaus in size and that they opened in the same way with a badge on one side, a piece of felt in the middle, and the identification card on the other side. [R. T. 46, 47.]

Agent Feldhaus arrested the defendant on June 29, 1962, at his office, 2240 University Avenue, San Diego, at which time appellant stated that he had received the file from Los Angeles on the John Durbin case, that it refreshed his memory and he was the one who had gone to see Mr. and Mrs. Reedy. [R. T. 49, 50.] At the time of his arrest appellant was carrying four cards [Exs. 1 to 4, incl.], Exhibit 2 bearing the large initials NBI. [R. T. 50-53.] On cross-examination Agent Feldhaus stated that he found Government's Exhibit 1, an identification card with appellant's picture and description and the words, National Bureau of Investigation, thereon, but did not find any card with the words, Federal Bureau of Investigation, on it. [R. T. 64.]

Frank Flores Gonzales testified that he was living at 345 South Euclid, San Diego, about August 30, 1961, while there was a boat parked outside the house apartments in which he was living. [R. T. 93, 94.] Gonzales heard a noise in the night outside his house, went outside and saw appellant standing beside an all black two-door Ford sedan to which the boat was then at-

tached. [R. T. 94, 95.] Gonzales went outside and asked appellant what he was doing and appellant told another man who was in the black car to "take off" at which time the other man drove off in the automobile with the boat. [R. T. 96.] Appellant then told Gonzales that he had come to repossess the boat. During this time Gonzales asked appellant who he was. Appellant stated he was from the Federal Bureau of Investigation. Gonzales testified he didn't understand what that meant and asked appellant what it meant, and then appellant stated that he was from the FBI. [R. T. 96, 97.] Gonzales asked Whaley to identify himself, whereupon Whaley opened his sport coat, took two steps back and "flashed" a white business card the reading on which Gonzales could not make out. Whaley was then asked to wait as Gonzales stated that he was going to call the police, but the appellant left the area at that time. [R. T. 98, 99.]

Haleen A. Williams testified he was at his brother's residence in San Diego on January 11, 1962, at which time he had his 1962 Thunderbird automobile parked outside that house when he observed the hood to his vehicle up and a black 1952 Ford two-door sedan with what he thought was a police antenna at the rear left of the bumper, parked in front of his automobile. [R. T. 116, 117.] Williams went outside with his brother and others and saw Whaley standing to the left rear side of his automobile, and inquired what was going on to which Whaley stated, "Who is Williams?" When the witness told Whaley he was Williams, Whaley flashed a badge at him and told him, "National City Police." [R. T. 118.] Whaley also stated at the time, "This car is being repossessed." Williams described

the badge as being gold in color and about the average size that the National City Police wear and that the manner in which Whaley showed the badge to him was by taking out a billfold and showing him the badge on which appeared the word, National, with Whaley's thumb covering the rest of the badge. [R. T. 119.] Williams asked Whaley, "What does the National City Police have to do in San Diego, and acting as an agent for a repossession outfit?" Williams then asked his brother-in-law to call the San Diego Police and requested Whaley not to move from the area; however, Mr. Whaley gave a signal to the man in the car and he drove off with Williams' car. [R. T. 120, 121.]

Defense.

Appellant testified that he was a private investigator or repossesser and that on March 13, 1962, he went to the house of the Reedys to locate or repossess a 1955 Plymouth from Mr. John J. Durbin who was represented to be the father of Mrs. Reedy. [R. T. 195, 196.] Appellant stated that Mrs. Reedy answered the door; that he identified himself by name as a special investigator with Pacific Coast Claims Adjusters and stated he was trying to locate John J. Durbin on instructions from the U. S. National Bank to locate him regarding the status of the account and to either bring the account current or repossess the automobile. [R. T. 197.] He said that Mr. Reedy then came to that door and he didn't recall which of the Reedys invited him in, but that he did not show Mrs. Reedy a badge before entering; instead he showed them the identification card which he claimed was Exhibit 1 and a badge [Ex. A] after entering their house. [R. T. 198, 199.] Appellant denied that he had identification on

him which stated he was a member of the Federal Bureau of Investigation. [R. T. 199, 200.] Whaley stated that after Mr. Reedy and then Mrs. Reedy looked at Whaley's badge holder and "I.D. card," Mr. Reedy then said, "You might as well tell him. They are going to find out anyhow." [R. T. 200, 201.] Mrs. Reedy then went and got an envelope which had the return address of a post office box in Marysville which she handed appellant, and Mr. Reedy then said to his wife, "Honey, you had to tell him. He is from the FBI." [R. T. 201.] Appellant stated he then thanked them and left, after which he submitted the information he had acquired to the U. S. National Bank in Oregon, for which his company received $15.00 of which he received $9.00. [R. T. 201, 202.]

Appellant stated he did not remember anything regarding the visit to the Reedys at the time of Agent Feldhaus' first interview and checked the file to see if it (Durbin case) had been closed and sent to Los Angeles and found it had been. [R. T. 204.] Appellant denied getting rid of identification bearing the name "Federal Bureau of Investigation" or "FBI." [R. T. 208.] Appellant also denied identifying himself to Williams as being a member of the National City Police Department on the occasion of repossessing Williams' Thunderbird automobile. [R. T. 209, 210.] Appellant stated that he told the three men who had appeared at the repossession of the boat and trailer that he was repossessing the boat "on behalf of the Morris Plan Company" and that his name was Whaley with the "National Bureau of Investigation." [R. T. 215.] Appellant denied he told the Reedys that it was a Federal offense to take mortgaged property across the

State line, and denied that he intended to pretend to be an agent of the Federal Bureau of Investigation for the purpose of obtaining information from the Reedys concerning the location of John Durbin. [R. T. 218.]

On cross-examination appellant admitted using the all black Ford when he went to the Williams and Gonzales places. [R. T. 220.] Appellant testified he was unable to recall the conversation with the Reedys when Agent Feldhaus first asked him about it, although admitting shortly after he left the Reedys on March 13, 1962, he caused to be typed and mailed a letter concerning the information obtained from them to the U. S. National Bank in Oregon. [Ex. 6; R. T. 226, 227.]

Carl Curtis Boler testified that he was a private detective and that the name of his company was National Bureau of Investigation, a registered company which had used that name since 1935, and had used an identification card since that time; that said identification was identical to Exhibit 1 and was the identification supposed to be used by Mr. Whaley who had been with him for about seven years, as well as the others in the company. [R. T. 164-170.]

Andrew Nossal testified he was the one who drove off Williams' Thunderbird and that at the times he was present at the scene he did not hear appellant inform Williams that he, Whaley, was a member of the National City Police Department. [R. T. 160.] On cross-examination Nossal testified that he was not present during the entire conversation that Williams had with Whaley and that the black Ford was similar to automobiles driven by the Detective Division of the Police Department.

Eugene B. Swartwood testified he was employed by appellant and worked for the National Bureau of Investigation; that he was present during most of the period that Whaley was talking to Williams and that he never heard Whaley state he was a member of the National City Police Department to Williams. [R. T. 176-177, 194.] Swartwood stated that he was present the night that the boat and trailer were repossessed and that Whaley stated to Gonzales and the others that he was Mr. Whaley of the National Bureau of Investigation. [R. T. 184.] Swartwood stated further that on the occasion of the Williams and Gonzales matters, Whaley used the black two-door sedan. [R. T. 183.]

Carl Rosenthal, the co-owner of Pacific Coast Claim Adjusters testified he was present at the time that the boat and trailer were repossessed and that appellant identified himself to the three people (Gonzales and two others) who came out of the house as Jack Whaley representing the Morris Plan Company, but that he did not hear him say "National Bureau of Investigation" or "Federal Bureau of Investigation." [R. T. 185, 186, 189, 190.]

Reilly P. Stearns, James R. Clifton and Frank C. Cross testified that the reputation of appellant for truth, honesty and integrity and as a law abiding citizen was good. [R. T. 140, 173, 194.]

V.

ARGUMENT.

A. The Evidence Amply Supports the Jury's Verdict of Guilty.

A conviction should be sustained on appeal if there is substantial evidence, taking the view most favorable to the government to support it. In considering the facts the reviewing court must grant every reasonable intendment in favor of appellee.

United States v. Glasser, 315 U. S. 60, 80 (1942);

Arena v. United States, 226 F. 2d 227, 229 (9th Cir. 1956), Cert. Den. 350 U. S. 954 (1956);

Bolen v. United States, 303 F. 2d 870, 874 (9th Cir. 1962).

The evidence shows that appellant came to the house of the Reedys in San Diego on March 13, 1962, for the purpose of obtaining information concerning the location of Mrs. Reedy's father. When he was not first admitted after stating that he was a special investigator and upon disclaiming that he had come about repossession of Durbin's automobile, he persisted by displaying a badge to Mrs. Reedy. After entry into the house was thus gained, appellant referred to possible Federal criminal charges involving Durbin and the trouble which could result from withholding information from "us." Appellant then produced identification which led the Reedys to believe the "us" to be the Federal Bureau of Investigation. It was after the statements and the production of the identification card that the Reedys became convinced that appellant was

from the FBI, and then furnished the information sought. This information was immediately thereafter relayed by appellant to the bank in Oregon and appellant later received compensation pursuant to his letter and bill.

The appellant claims that at no time did he represent orally that he was an agent of the Federal Bureau of Investigation and stresses that

> "the only witness from whom the only bit of testimony that the prosecution presented, was Mr. Reedy, who stated that he saw appellant's identification card bearing the words 'Federal Bureau of Investigation.' "

The testimony of Mr. Reedy was of itself, of course, very substantial evidence of the representation made by appellant. There was additionally the testimony of both Reedys that Mr. Reedy made the statement before any information concerning Durbin's location was furnished that the appellant "was from the FBI" and that they might as well provide the information because regardless he was going to find out. This statement was made after appellant had represented along other things that the charges had been referred to "us," that transporting a car across State lines without the owner's permission was a "federal" crime, and that the Reedys could get into "trouble" if they withheld information.

There is also the testimony of both Reedys that they believed appellant was in fact and FBI agent and that the information would not have been furnished had that belief not been so held by them. The fact that the card testified to by Mr. Reedy was not later found or

specifically asked for by Agent Feldhaus is not significant, particularly since at the time the agent first went to see the appellant the latter did not produce any executed credentials and disclaimed remembering the incident at all even though he had detailed the information received from the Reedys in a letter written very shortly thereafter and for which he later received compensation.

It is submitted that the evidence viewed in its correct light amply supports the verdict of guilty as charged.

B. The Trial Court Did Not Err in Its Instructions.

Although Rule 30, Federal Rules of Criminal Procedure, provides for the submission of instructions by a defendant and the stating distinctly to the trial court of the matter to which he objects, the appellant broadly and without any showing that such contention was properly made below asserts only that the instructions "resulted in prejudice to the appellant."

Appellant first claims at page 6 of his brief that the trial court "distinctly implies intention and motive to be one and the same thing." Appellant quotes a portion of the instructions at Reporter's Transcript, pages 246 and 247, lines 16 through 20, and lines 15 through 19, respectively, yet fails to include the following instructions at page 247, lines 8 through 10:

> "Now, intent and motive are never to be confused. Motive is that which prompts a person to act. Intent refers only to the state of mind with which an act is done or omitted."

It is clear from the reading of the instructions on intent as a whole set forth in Appendix B [R. T. p. 246, line 6, to p. 247, line 18, inclusive] hereto, that there is no merit to this contention.

Next, appellant claims that the instructions set forth as Appendix C hereto, are ambiguous and "not the law," apparently basing this alleged error on the contention that "the appellant certainly had no duty to inform the prosecution witness Reedy in the light of all the circumstances that he was not from the Federal Bureau of Investigation."

The case to which appellant apparently refers in support of this proposition is *Massengale v. United States,* 240 F. 2d 781 (6th Cir. 1957), cert. denied June 10, 1957, 354 U. S. 909. In this case defendant was an employee of the Federal Detective Bureau, Inc., and the Court of Appeals for the Sixth Circuit in reversing the District Court on impersonation count stated that there was no evidence presented that defendant at any point declared himself to be an agent of the Federal Bureau of Investigation or that defendant assumed or pretended to be an officer or employee acting under the authority of the United States. The badge worn by defendant bore the words "Federal Detective Bureau, Inc.," and he gave the witness to whom he had stated that he was from the "Federal Bureau" a phone number which was that of the Federal Detective Bureau where he was later promptly located.

The Sixth Circuit's decision turned upon an issue of sufficiency of evidence in which the facts were obviously far short of the series of actions by appellant in this case. But neither the facts in the *Massengale*

case nor appellant's version of the facts in this case can serve as a foundation for his proposition that the instructions given were not the law. As was stated in *Pierce v. United States,* 86 F. 2d 949 (6th Cir. 1936), at 951 concerning a similar charge under former Section 76 of Title 18, where a contention was made that the testimony was intrinsically destitute of a probative value as a basis of a finding of false impersonation:

> "Likewise must be rejected the contention that the representations if made were too absurd and irrational to constitute a false pretense, and that to come within the statute they must be such as would be calculated to deceive persons of ordinary intelligence in the absence of a showing that they were addressed to illiterates or those of subnormal mental capacity. We find nothing in the statute that confines its prohibitions to those representations or pretenses which are sufficiently convincing to deceive only those least gullible. Indeed, the purpose of the statute is broader than mere protection of the credulous. As was said in United States v. Barnow (239 U. S. 74), *supra:*
>
> 'In order that the vast and complicated operations of the government of the United States shall be carried on successfully and with a minimum of friction and obstruction, it is important—or, at least, Congress reasonably might so consider it—not only that the authority of the governmental officers and employees be respected in particular cases, but that a spirit of respect and good will for the government and its officers shall generally prevail. And what could more directly impair this spirit than to permit unauthorized and unscrupulous

persons to go about the country falsely assuming, for fraudulent purposes, to be entitled to the respect and credit due to an officer of the government? It is the false pretense of Federal authority that is the mischief to be cured.' "

See also:

United States v. Lepowitch, 1943, 318 U. S. 702, 704.

As a final matter alleged as error, appellant contends that the Court's instructions in response to an inquiry by the jury, which instructions appellant does not detail in his brief, were "so ambiguous that it cannot be seen by appellant how the jury had any basis on which to arrive at a conclusion." But it is plain from a reading of the final paragraph of the instructions given by the trial court [R. T. 266, 267], to which appellant then appeared satisfied, that the instructions were crystal clear in response to the question concerning false pretenses made by the jury:

"But the question in your minds, the crucial thing is, when was there any false pretense, if there was? When did the defendant, with guilty intent, create that impression, if he did? He might not have created it with a guilty mind at all. But in order to be guilty of this crime, he must have the guilty state of mind in endeavoring to get the thing of value, namely, the information. He must have the criminal intent at that time, at the time he seeks the information, and gets that information. That's the crucial time. And that is what I wanted to emphasize."

C. The Trial Court Did Not Err in Admitting Evidence of Prior Similar Acts.

The appellant contends, without citing authorities, that the evidence of his representing to Gonzales about August 30, 1961, that he was from the "FBI" and his representing to Williams on January 11, 1962, that he was a National City Policeman, in connection with the repossessions there involved was "remote, prejudicial incompetent, irrelevant and immaterial." It has been well established that such evidence is admissible for the purpose of showing intent and state of mind of appellant concerning the offense charged; and the court so instructed the jury in this case at the time of the receipt of the Gonzales and Williams testimony and again in its final instructions. [R. T. 99-101; 116; 248, 249.]

Nye & Nissen v. United States, 1949, 336 U. S. 613, 618;

Massei v. United States (1 Cir., 1957), 241 F. 2d 895;

Harper v. United States (D. C. Cir. 1956), 239 F. 2d 945;

Enriquez v. United States (9 Cir. 1951), 188 F. 2d 313;

Allen v. United States (6th Cir. 1961), 289 F. 2d 235, 236.

VI.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the jury verdict of guilty in the court below should be affirmed.

Respectfully submitted,

FRANCIS C. WHELAN,
United States Attorney,

THOMAS R. SHERIDAN,
Assistant U. S. Attorney,
Chief, Criminal Section,

ELMER ENSTROM, JR.,
Assistant U. S. Attorney,

Attorneys for Appellee.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ELMER ENSTROM, JR.,
Assistant United States Attorney.

APPENDIX "A."

In the United States District Court in and for the Southern District of California, Southern Division.

July, 1962, Grand Jury—Southern Division.

United States of America, Plaintiff, vs. John William Whaley, Defendant. No. 30993-SD

Indictment (U.S.C., Title 18, Section 912—Impersonation of Federal Officer).

The Grand Jury charges:

On or about March 13, 1962, in San Diego County, within the Southern Division of the Southern District of California, defendant John William Whaley did falsely pretend to be an officer and employee of the United States, to wit: an agent of the Federal Bureau of Investigation, and in such pretended character obtained from Robert Reedy and Roberta Catherine Reedy a thing of value, to wit: information concerning the address and location of one John Durbin.

A True Bill

.....

Foreman

FRANCIS C. WHELAN,
United States Attorney

APPENDIX "B."

[R. T. p. 246, line 6, to p. 247, line 18, incl.]

In every crime there must exist a union or joint operation of act and intent.

The burden is always upon the prosecution to prove both act and intent beyond a reasonable doubt.

With respect to major crimes, such as charged in this case, specific criminal intent must be proved before there can be a conviction.

Specific criminal intent, as the term itself suggests, requires more than a mere general intent to engage in certain conduct.

A person who knowingly does an act which the law forbids, or who knowingly fails to do an act which the law requires to be done, intending with bad purpose either to disobey or disregard the law, may be found to act with specific criminal intent.

An act or failure to act is done knowingly if done voluntarily and purposely, and not because of mistake or inadvertence or other innocent reason.

It is not necessary for the prosecution to prove knowledge of the accused that a partuclar act or failure to act is a violation of law. Unless and until outweighed by evidence to the contrary, the presumption is that every person knows what the law forbids, and what the law requires to be done. However, evidence that the accused acted or failed to act because of ignorance of

the law may be considered in determining whether or not the accused acted or failed to act with specific criminal intent as charged.

Now, intent and motive are never to be confused. Motive is that which prompts a person to act. Intent refers only to the state of mind with which an act is done or omitted.

Personal advancement and financial gain are two well-recognized motives for much of human conduct. These laudable motives may prompt one person to voluntary acts of good, another to voluntary acts of crime.

So good motive alone is never a defense where the act done or omitted is a crime. Motive of the accused is immaterial indeed except insofar as evidence of motive may aid determination of intent or state of mind.

APPENDIX "C."

[R. T. p. 251, lines 10 to 24, incl.]

The statute is aimed against false pretense of any office or employment under the United States. Thus it is of no consequence whether the pretender names an existing or a nonexisting office or officer, or fails to name, describe or designate accurately the pretended office or employment.

The statute is intended not only to protect innocent persons from actual loss through reliance upon false assumptions of Federal Authority, but also to maintain the good repute and dignity of the Federal Service itself.

It is no defense to asset that a reasonable person should not have been deceived by the false pretense. The object of the statute is to safeguard the respect due the authority of Federal officers from the most gullible as well as the least credulous.

FOR THE NINTH CIRCUIT

JOHN W. WHALEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court
Southern District of California
Southern Division

APPELLANT'S OPENING BRIEF

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN W. WHALEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee

APPELLANT'S OPENING BRIEF

I

STATEMENT OF THE CASE

On September 27, 1962, appellant was convicted on a one count indictment, in which he was charged with a violation of Section 912 of Title 18, United States Code, in that he falsely pretended to be an officer and employee of the United States and in such pretended character did obtain a thing of value. On October 5, 1962, His Honor, Judge WILLIAM C. MATHES, committed appellant to the custody of the Attorney General for imprisonment for a period of three years, suspended execution of the sentence and placed appellant upon probation for a period of five years.

II

THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE VERDICT

Appellant was employed by a corporation known as the National Bureau of Investigation, which company name had been used for the past 27 years, and which was registered in the County of Los Angeles, State of California, (Reporter's Transcript - R.T. p. 164, lines 11 to 25). He was employed by said corporation for a period of seven to ten years (R.T. p. 170, lines 1 to 5). That the employees of said corporation, including the appellant, used an identification card, Government Exhibit No. 1, since 1935 (R.T. p. 166, lines 19 to 22). Also, said employees were compelled to carry a badge bearing the name National Bureau of Investigation (R.T. p. 167, lines 11 to 17).

On or about March 13, 1962, appellant contacted Mr. and Mrs. Reedy (prosecution witness), to ascertain the whereabouts of Mrs. Reedy's father. Appellant purportedly showed Mr. Reedy an identification card, bearing the name Federal Bureau of Investigation. That appellant at no time represented orally that he was from the Federal Bureau of Investigation (R.T. p. 73, lines 16-17). The evidence is insufficient to sustain the verdict in the instant case. The only witness from whom the only bit of testimony that the prosecution presented, was Mr. Reedy, who stated that he saw appellant's identification card, bearing the words Federal Bureau of Investigation. Appellant was dressed in a sport outfit (R.T. p. 6, lines 1 to 2); he was wearing a sports shirt (R.T. p. 77, lines 1 to 2), and was driving a 1961 Oldsmobile F. 85 compact automobile (R.T. p. 176, lines 13 to 14; p. 71, lines 11 to 13).

Further, both Mr. and Mrs. Reedy stated that appellant was present because of repossessing their father-in-law's vehicle (R.T. p. 6, lines 17 to 20), and further, there was discussion concerning the past attempts to repossess their father-in-law's car for non-payment (R.T. p. 79, lines 19 to 25; p. 83, lines 11 to 14; p. 84, lines 14 to 21; p. 25, lines 1 to 10). Appellant did not exhibit a gun (R.T. p. 17, lines 1 to 2), nor was there any threat of prosecution (R.T. p. 26, lines 15 through 18; p. 27, lines 23 to 25, and p. 28, lines 1 through 11).

The Reedys then stated that they relied on the impression that appellant was a member of the F.B.I. and thus gave him this information. This is contradicted not only by appellant's testimony, but also by the fact that he was invited into the residence before any representations were made (R.T. p. 72, lines 24 to 25; p. 73, lines 1 to 3), and yet the Reedys would not give their father's telephone number to appellant (R.T. p. 86, lines 22 to 24).

The main substantial fact, namely, the identification card, was never even inquired into by the special agent for the Federal Bureau of Investigation (R.T. p. 67).

The factor of identification card was substantially controverted not only by the prosecution's evidence, but also by appellant's evidence, an example of which can be found to the stipulation of the identification card (R.T. p. 10, lines 9 to 23).

Upon appellant's leaving the premises, Mr. Reedy explained that Mr. Whaley was from the Federal Bureau of Investigation, whereupon Mr. Whaley left the residence. This was the entire premise for said conviction.

Two additional cases were brought in for the purpose of showing intention, which matters were objected to on the basis of irrelevancy, immateriality and

remoteness, and which objections were overruled. The first instance took place approximately August 30, 1961, wherein appellant repossessed a boat from a Mr. Gonzales, and the only testimony here was that at one point the appellant told the witness he was from the Federal Bureau of Investigation. The boat had already been repossessed. This witness knew they were repossessing same (R.T. p. 109, lines 13 to 24). There was no reliance hereon, and this testimony was controverted, not only by the defense, but by defense witnesses Eugene B. Swartwood (R.T. p. 184, lines 19 to 21) and by a witness Carl Rosenthal.

Another incident was introduced by a prosecution witness, Mr. Haleen A. Williams, stating that appellant had represented to him that he was from the National City Police Department. This again was re repossessing a car, the witness knew the car was being repossessed. This again was controverted by a defense witness Swartwood and Mr. Andrew Nossal, who is now a member of the Sheriff's Department of San Diego County. At this instance, the San Diego Police Department was called. No arrests were made. That apparently it was felt by the San Diego Police Department that Mr. Williams was not telling the truth.

Further, the appellant and Eugene Swartwood testified that they never had a card bearing the words Federal Bureau of Investigation (R.T. p. 183, lines 7 to 11).

In addition, two witnesses were introduced as character witnesses on behalf of the appellant, Mr James R. Clifton, an employee of the First National Trust and Savings Bank, and Reilly P. Stearns.

In the light of all this evidence, it is the contention of appellant that this evidence was insufficient to warrant a conviction. The motion for dismissal was

made to the court after the prosecution's evidence was introduced, which motion was taken under submission by the Court, and never decided until all the evidence was introduced, at which time the Court then denied the motion.

EVIDENCE OF THE PRIOR ACTS THAT WERE INTRODUCED OVER THE OBJECTIONS OF APPELLANT'S COUNSEL WERE REMOTE, PREJUDICIAL, INCOMPETENT, IRRELEVANT AND IMMATERIAL TO THE ISSUES.

In the first instance (The Gonzales incident) there was no reliance by said witness - he knew it in fact that a repossession was taking place, and there was no similarity to show a common scheme and design, or to show intention.

In the "Williams' incident", it had nothing to do with representations concerning being a member of the Federal Bureau of Investigation. Also, the contrary evidence was so overwhelming that this testimony should not have been allowed into evidence.

III

THE COURT ERRED IN HIS INSTRUCTIONS GIVEN TO THE JURY, WHICH RESULTED IN PREJUDICE TO THE APPELLANT.

The Court gave instructions which, when followed by the jury, would have been contradictions and cannot be reconciled.

At Reporter's Transcript, page 246, lines 16 through 20, the Court states:

"A person who knowingly does an act which the law forbids, or who knowingly fails to do an act which the law requires to be done, intending with bad purpose either to disobey

or disregard the law, may be found to act with specific criminal intent."

Compared to Reporter's Transcript, page 247, lines 15 through 19,

"So good motive alone is never a defense where the act done or omitted is a crime. Motive of the accused is immaterial indeed except insofar as evidence of motive may aid determination of intent or state of mind."

The Court, on the one hand, discussed "intent", and on the other hand discusses the question of "motive". It is also conceded that motive is generally speaking immaterial in a criminal case; however, according to the instructions at Reporter's Transcript, page 246, the court distinctly implies intention and motive to be one and the same thing, and with this, appellant cannot agree.

The court further instructed the jury at Reporter's Transcript, page 251, lines 10 to 24:

"The statute is aimed against false pretense of any office or employment under the United States. Thus it is of no consequence whether the pretender names an existing or a non-existing office or officer, or fails to name, describe or designate accurately the pretended office or employment.

The statute is intended not only to protect innocent persons from actual loss through reliance upon false assumptions of Federal Authority, but also to maintain the good repute and dignity of the Federal Service itself.

> It is no defense to assert that a reasonable person should not have been deceived by the false pretense. The object of the statute is to safeguard the respect due the authority of Federal officers from the most gullible as well as the least credulous." (Emphasis added.)

inferring that a person can be convicted of this crime whether or not he does make a representation or fails to make a representation - that the important thing is the reliance one places upon a set of circumstances, whether reasonably or unreasonably.

It is contended that this instruction is ambiguous and is "catch as catch can". This is certainly not the law. There are many instructions, where persons may arrive at impressions and conclusions, and would not have the right or the privilege to do so. In the instant case, the appellant certainly had no duty to inform the prosecution witness Reedy in the light of all the circumstances that he was not from the Federal Bureau of Investigation. Federal Detective Bureau Inc. vs. U.S., 77 S. Ct. 1296, 354 U.S. 909.

Also, according to the instructions, the court in effect made the jury partisans rather than judges. When the court instructed the jury that the respect of the federal services was to be maintained, it in effect inferred that if the jury were to acquit the appellant, that the good name of the Federal Bureau of Investigation would not be maintained. Such may be the object of the law. However, it is the contention of appellant, that such object should not have been put in the instructions, and was not the function of a jury to consider.

The next instruction which the court gave, and to which appellant objects,

was Reporter's Transcript, page 243, lines 16 through 20:

> "Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence." (Emphasis added.)

The only one who could possibly be affected by the verdict would be appellant, and it is contended that such statement informs that the defendant would be more prone to telling non-truth, and that this would be extremely prejudicial to his case.

Thereafter, the jury, during its deliberation, requested of the Court to define "falsely pretending", which was the CRUX of this case. The Court than instructed the jury by way of example, which can be seen at Reporter's Transcript, page 260, lines 10 through 25; page 261, page 262, page 263 and page 264.

In this instruction, and by way of example, a court in effect stated that a person could be convicted of the herein crime, regardless of any duty that he may have cast upon his shoulders, even though the assumption made by the alleged innocent party was unwarranted. the jury seemed satisfied with this instruction. Thereafter, defense counsel informed the court as to the unreasonableness of his instructions, and the court then recalled the jury and attempted to clear this by a subsequent instruction given (R.T. p. 265 to p. 267). It is contended by the appellant that such manner of giving instruction was erroneous and extremely

prejudicial to the appellant, and was so ambiguous that it cannot be seen by appellant how the jury had any basis on which to arrive at a conclusion.

Respectfully submitted,

ROCK ZAITZOW

Attorney for Appellant

No. 18680

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

J. BUMB,

Appellant,

vs.

BONAFIDE MILLS, INC.,

Appellee.

APPELLANT'S OPENING BRIEF.

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IN THE

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A. J. BUMB,

Appellant,

vs.

BONAFIDE MILLS, INC.,

Appellee.

APPELLANT'S OPENING BRIEF.

Jurisdictional Basis.

This is an appeal from a final judgment made and entered in the United States District Court for the Southern District of California, Central Division, and this appeal is prosecuted in accordance with the provisions of Rule 72 *et sequitur* of the Federal Rules of Civil Procedure.

On July 3, 1962, the Appellant filed his application for a Temporary Restraining Order, Permanent Injunction, Reasonable Attorney's Fees, etc. [Clk. Tr. p. 226.] The Court issued an immediate Order to Show Cause and a Temporary Restraining Order and set the matter down for hearing upon the allegations of the Application of the Appellant. [Clk. Tr. p. 234.]

The Appellee, Bonafide Mills, Inc., filed its response to the Application. [Clk. Tr. p. 236.] After a hearing the Referee in Bankruptcy made his Findings of Fact, Conclusions of Law and Order on September 12, 1962, by the terms of which, he issued a Permanent Injunc-

tion barring the Appellee, Bonafide Mills, Inc., from pursuing a certain action in the State Courts of the State of California. [Clk. Tr. p. 239.] The injunction was subsequently amended by an Amended Order of Injunction on September 20, 1962. [Clk. Tr. p. 244.]

The Appellee, Bonafide Mills, Inc., filed a Petition for Review on September 27, 1962, for a hearing before the United States District Court and to review the order of injunction of the Referee. [Clk. Tr. p. 245.] A hearing was held before the United States District Judge and he issued a Memorandum of Decision on March 21, 1963, which was entered on March 22, 1963. [Clk. Tr. pp. 256 and 270.] Notice of Appeal was filed by Appellant on April 19, 1963 to the above-entitled Honorable Court. [Clk. Tr. p. 271.]

Statement of the Case.

The pertinent facts in this matter may be summarized as follows:

On July 13, 1959, bankruptcy proceedings were commenced in the Southern District of California against one, R. M. Hacker, by creditors' filing of an Involuntary Petition in Bankruptcy. On July 14, 1959, A. J. Bumb was appointed Receiver to take custody of the assets of the Alleged Bankrupt. The Receiver's authority was limited to that of a custodian and he was not authorized to, nor did he, conduct the business of the Alleged Bankrupt.

Prior to the filing of Involuntary Bankruptcy Proceedings, the Alleged Bankrupt had executed a general assignment for the benefit of creditors on or about July 7, 1959 to one, M. W. Engelman, as Assignee. [Clk. Tr. p. 147.]

On September 15, 1959, the Appellee, Bonafide Mills, Inc., filed a claim in the pending bankruptcy proceed-

ings for the recovery of $8,226.58 based upon goods shipped to the bankrupt on consignment and subsequently sold by said bankrupt.

On October 1, 1959, the Appellee, Bonafide Mills, Inc., filed a Petition in Reclamation in the bankruptcy proceedings [Clk. Tr. p. 52] seeking recovery of a quantity of merchandise from the Debtor, R. M. Hacker, and/or A. J. Bumb, Receiver, allegedly sold and delivered on a consignment basis.

The Petition in Reclamation named the debtor, R. M. Hacker, as well as the Receiver, A. J. Bumb, as parties.

Subsequently, on October 31, 1960, a Stipulation for the withdrawal of the aforesaid Petition in Reclamation and to fix the amount of the claim of Bonafide Mills, Inc. and for a return of certain merchandise was entered into between the Appellee, Bonafide Mills, Inc. and the attorneys for the Debtor, R. M. Hacker. [Clk. Tr. p. 193.] The Receiver and his attorney of Record were not a party to this Stipulation and did not execute it, although the Stipulation was subsequently approved by the Referee in Bankruptcy.

This Stipulation increased the general claim of the Appellee, Bonafide Mills, Inc., on file from $8,226.58 to $27,590.39 an increase of $16,578.98.

In the course of the administration of the bankruptcy proceedings, the Alleged Bankrupt, R. M. Hacker, filed a Plan of Arrangement under Chapter XI for a composition or general settlement with his creditors paying them a partial dividend in satisfaction of their claims. The dividend was paid about March 27, 1961 to the approved creditors in the approximate amount of

twenty-seven and one-half percent (27½%). [Clk. Tr. p. 209.] This included a dividend to the Appellee Bonafide Mills, Inc., upon its increased claim of $27,590.39. [Clk. Tr. p. 216.]

Upon payment of these general dividends and upon approval of the Report and Account of the Receiver, A. J. Bumb, the case was closed; the proceedings dismissed; the Receiver's authority terminated and his bond exonerated. [Clk. Tr. pp. 223, 224 and 225.]

On June 22, 1961, Bonafide Mills, Inc. filed an action-at-law in the Superior Court in and for the County of Los Angeles, State of California, naming the Receiver, A. J. Bumb, and the general Assignee for the benefit of creditors, M. W. Engelman, as Defendants in four (4) counts. The Complaint, a copy of which was received in evidence by the Referee in Bankruptcy, the gist of which is referred to in the Memorandum Decision of the United States District Judge on page 5 of his Memorandum Decision [Clk. Tr. p. 260], generally, speaking, seeks recovery of merchandise or its value in the amount of $16,578.98 allegedly taken in possession by either the Defendant, M. W. Engelman or A. J. Bumb, Appellant.

In July of 1962, the entire bankruptcy proceedings were re-opened upon the application of A. J. Bumb as Receiver. On July 3, 1962, Appellant, A. J. Bumb, filed his Application for a Temporary Restraining Order for a Permanent Injunction; for Reasonable Attorney's Fees and other relief. [Clk. Tr. p. 226.] Upon the strength of the allegations of this Application, an Order to Show Cause, Temporary Restraining Order and and Order for a Hearing were made and entered by the Referee in Bankruptcy. [Clk. Tr. p. 234.]

Bonafide Mills, Inc. filed its Response to the Application of A. J. Bumb, but did not reserve the jurisdictional question nor interpose an objection to the summary jurisdiction of Court by either its response or by a motion filed before the time prescribed by the Referee for filing its answer. [Clk. Tr. p. 236.]

The hearing was held and upon the conclusion of the hearing, the Court made Findings of Fact, Conclusions of Law and an Order on September 12, 1962, by the terms of which a permanent injunction was issued enjoining the proceedings in the Superior Court for Los Angeles County. [Clk. Tr. p. 239.] This Order was subsequently amended by the Referee on September 20, 1962 at the request of Bonafide Mills, Inc. [Clk. Tr. p. 244.]

It is to be noted that the Order of the Referee in Bankruptcy does not prevent Bonafide Mills, Inc. from pursuing a cause of action or claim against the Receiver. It merely prescribes that Bonafide Mills, Inc. must press or process its claims before the Court which appointed the Receiver, to wit, the Bankruptcy Court.

Within the time prescribed by law, the Appellee, Bonafide Mills, Inc. filed its Petition for Review on September 27, 1962. [Clk. Tr. p. 245.] The Referee certified the facts to the United States District Court on October 15, 1962. [Clk. Tr. p. 254.] It is to be noted that the sole question as set forth in the Referee's Certificate is whether or not the Referee in Bankruptcy had the jurisdiction to make and issue the injunction complained of by the Appellee.

The District Court, in a fairly lengthy opinion, reversed the Order of the Referee in Bankruptcy from which this Appeal has been prosecuted.

POINT ONE.

The Referee Had Jurisdiction by Consent of Appellee to Issue an Injunction.

To begin, with, the proceedings were commenced before the Referee by the filing of the Application for a Temporary Restraining Order and a Permanent Injunction. The Temporary Restraining Order was issued and a hearing was held upon whether or not such should become permanent. The Appellee, it is to be noted, filed his Response a copy of which has been forwarded by the Referee with his Certificate. The Response, it is noted, goes to the merits of the controversy and does not include an objection to the jurisdiction of the Court. No prior objection or motion was ever made and at the outset, it would appear that the Appellee consented to the jurisdiction of the Bankruptcy Court to hear the matter on its merits. *Section 2a(7) of the Bankruptcy Act (11 U. S. C. Section 11)* provides as follows:

> "Cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided, and determine and liquidate all inchoate or vested interests of the bankrupt's spouse in the property of any estate whenever, under the applicable laws of the State, creditors are empowered to compel such spouse to accept a money satisfaction for such interest; *and where in a controversy arising in a proceeding under this Act an adverse party does not interpose objection to the summary jurisdiction of the court of bankruptcy, by answer or motion filed before the expiration of the time prescribed by law or rule of court or fixed*

or extended by order of court for the filing of an answer to the petition, motion or other pleading to which he is adverse, he shall be deemed to have consented to such jurisdiction;"

Comment is made upon the foregoing. *In Volume I, Collier on Bankruptcy, 14th Edition, Supplement (1961), page 27* as follows:

"Section 2a (7) was amended in 1952 by the addition of a provision to the effect that an adverse party is deemed to have consented to the summary jurisdiction of the court unless there is timely interposition of an objection to the jurisdiction of the court. In effect this amendment overrules the case of Cline v. Kaplan (1944) 323 U. S. 97, discussed in the Treatise in 23.08 (Vol. 2). The amendment was made to Section 2a (7) rather than to Section 23, so that it would apply to all sections of the Bankruptcy Act, including the debtor relief provisions."

POINT TWO.

By Entering the Bankruptcy Court With a Proof of Claim, a Petition in Reclamation and by Participating in Its Dividends the Appellee Selected and Approved a Forum to Deal With All Aspects of His Claims.

But the express consent to jurisdiction goes far beyond the failure to assert the lack of jurisdiction by timely motion in Act.

By entering the Bankruptcy Court with a request for relief, by the filing of a Petition in Reclamation, as well as by the filing of a general claim, the execution of stipulations, the Appellee creditor here has selected a

forum and entered the jurisdiction thereof for all purposes, including but not limited to the subject matter of his claim, defenses and off-sets thereto and other matters affecting the substance in the same subject matter. In other words, the Appellee filed a Petition in Reclamation to recover property. Appellee filed well general claim for that property which he allegedly did not receive or recover and this claim was allowed by the Referee and participated with the other creditors in a dividend from the estate. The same matters which are the subject of his claim and his Petition is Reclamation were embodied in a suit against the Receiver filed in the Superior Courts. The Referee found the same suject matter to be involved.

Under these circumstances and in addition to the foregoing arguments, Appellee has conferred jurisdiction upon the Referee in Bankruptcy for all matters, including if you will, counter-claims should it be the desire of third persons connected with the bankruptcy estate to file such. This has not been done, but under the cases it is possible. The filing of a general, unsecured claim in a Bankruptcy proceeding confers jurisdiction upon the Referee to hear all matters related there to and to render affirmative judgments. See the cases of *Interstate National Bank of Kansas City v. Luther* (C. A. 10), 221 F. 2d 382. See *In re Solar Manufacturing Corporation* (C. A. 3), 200 F. 2d 327. See *Columbia Foundry v. Lockner* (C. A. 4), 179 F. 2d 630. See also *Chase National Bank v. Lyford* (C. A. 2), 147 F. 2d 273.

A leading case in this District, and one cited throughout the length and breadth of Bankruptcy decisions on this question is the opinion of Judge Mathes, written in the matter of *In re Nathan* (S. D. Cal.), 98 F. Supp. 686, where Judge Mathes quoted from the Supreme Court at *page 692,* as follows:

> "As Mr. Justice Douglas put it in Case v. Los Angeles Lumber Products Co., 1939, 308 U.S. 106, 126-127, 60 S. Ct. 1, 12, 84 L. Ed. 110: 'And once the jurisdiction of the court has been voked, whether by the debtor or by a creditor, that petitioner cannot withdraw and oust the court of jurisdiction. He invokes that jurisdiction risking all of the disadvantages which may flow to him as a consequence, as well as gaining all of the benefits.' See also May v. Henderson, 1925, 268 U. S. 111, 116-118, 45 S. Ct. 456, 69 L. Ed. 870; In re International Power Securities Corp., 3 Cir., 1948, 170 F. 2d 399, 402, 405-406; Bank of California v. McBride, 9 Cir., 1943, 132 F. 2d 769, 772; Floro Realey & Investment Co. v. Steem Electric Corp., 8 Cir., 1942, 128 F. 2d 338, 340-341; In re Gillespie Tire Co., D. C. W. D. Car. 1942, 54 F. Supp. 336, 338-341."

The rule in the *Nathan* case is not only a rule of law but a rule of good reason. It has been adopted by leading authorities on Bankruptcy to the effect that where a party first seeks relief in the Bankruptcy Court, his subsequent suit in a State Court against the Re-

ceiver in his individual capacity may be enjoined. See *Collier on Bankruptcy, Volume I, Section 2.30, footnote 4 at page 225.*

A similar situation occurred in the *Matter of Green,* 20 A.B.R. (N. S.) 536, 58 F. 2d 807 (S. D. N. Y. 1932). In this case, a Receiver in a Bankruptcy matter enjoined the prosecution of a State action against him individually. The plaintiff had appeared in the Bankruptcy proceedings prior to the filing of the State Court action and by motion, sought to have the Receiver turn over certain property which he claimed to be his. The plaintiff's motion was denied when it was found that his affidavits were insufficient. Thereafter, the plaintiff filed a State Court action suing the Receiver in his individual capacity. In granting the injunction against the State Court action, the District Court held,

> "It is held that Abramson's choice was deliberate, informed, and calculated to result in an adjuciation upon the merits. It is thought that the attempt now to evade the consequences of that application is not compatible with the fair respect for the court to which it was presented."

The *Green* case has been cited with approval in the matter of *In re Trayna and Cohn,* 195 Fed. 486 (C.A. 2, 1912), *27 A. B. R. 594.* In this case, the Receiver petitioned the Court for permission to sell property of the bankrupt, subject to certain liens, among them a chattel mortgage held by the plaintiff.

The property was sold and a trust resulted in the funds more than sufficient to pay the amount of the mortgage. This still did not satisfy the plaintiff mortgage holder. The hearing was held to determine the validity of his mortgage and he failed to appear. Thereafter, he sued the Receiver in his individual capacity, charging him with conversion. The Court decided that the controversy between the plaintiff was one that should be heard and determined in the Bankruptcy Court. The Circuit Court of Appeals stated as follows:

> "By not objecting to the sale and by himself invoking the jurisdiction of the Bankruptcy Court, he ratified the sale free of liens and conferred authority upon the court to adjudicate the validity of his mortgage. The Receiver relied and had a right to rely upon these actions of the petitioner and shaped his course accordingly. Had he known that the petitioner intended to hold him in trover, he very likely would not have done the acts of which the alleged conversion is predicated. In any view, he had a right to rely upon the question being determined and the tribunal whose jurisdiction the petitioner had invoked. Having by tacit consent in affirmative action induced the Receiver to join issue with him in the Bankruptcy Court, the petitioner should not be permitted to remove the controversy to a tribunal which he may think more favorable to his contentions."

POINT THREE.

The Referee in Bankruptcy Had Abundant Authority to Issue the Injunction in Question.

The next question, if it could be considered a question at all, is whether or not a Bankruptcy Referee has authority to issue an injunction under these circumstances.

It is generally conceded that the authority of a Referee in Bankruptcy to issue an injunction resides in *Section 2a(15) of the Bankruptcy Act (11 U. S. C. Section 11),* which provides as follows:

> "Make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act: PROVIDED, HOWEVER, That an injunction to restrain a court may be issued by the judge only;"

It has been affirmatively held that this particular Section is broad enough to cover the issuance of temporary restraining orders, injunctions and the like and in fact, an excellent discussion of this authority is contained in a recent case, In the Matter of *In re Lustron Corporation* (C. A. 7, 1950), 184 F. 2d 789, cert. den. 340 U. S. 946.

The general treatment of the proposition that the Bankruptcy Court may issue injunctions, temporary restraining order and the like under *Section 2 of the Bankruptcy Act,* may be found in *Section 3579 of Remington on Bankruptcy, Volume 9* thereof, and in *Collier on Bankruptcy, Volume I* thereof, *Section 2.64 commencing at page 337.* See *Matter of Sterling* (C. C. A. 9, 1942), 48 A. B. R. (N. S.) 468; 125 F. 2d 104.

See also the case of *In re Matter of California Pea Products, Inc.* (Southern District of California, 1941), 45 A. B. R. (N. S.) 393; 37 F. Supp. 658, *which was an opinion decided by Judge Paul McCormick formerly of this District.*

Judge McCormick went on to say:

> "Section 2(15) of the Bankruptcy Act empowered the referee to 'make such orders, issue such process, and enter such judgments, . . . as may be necessary for the enforcement of the provisions of this title, (act); provided, however, that an injunction to restrain a court may be issued by the judge only.' This statute, as well as General Order 12, effective February 13, 1939, is a rule of procedure relating to the remedy and is applicable to this bankruptcy matter and, particularly, to the injunction herein which was issued March 22, 1940. And in arriving at the extent of power that is conferred upon the referee by section 2(15), the concluding clause of the subsection is a clear investiture in the refereee under a general reference to issue all injunctions in the course of the bankruptcy proceeding necessary to prevent the defeat or impairment of his jurisdiction except that only a judge can enjoin a court. It would have been a simple matter for Congress to have made the prohibition against the referee's power to issue injunctions general if such had been the legislative intent. As no such intent appears but, on the contrary, only a single specific prohibition being shown, the referee is in all other instances vested with plenary judicial power to issue stay orders when acting under a general reference."

POINT FOUR.

The Referee Clearly Acted Within the Reasonable Limits of His Discretion.

The only and final question which can occur to the writer is whether the Court in the making and issuance of this injunction abused its discretion. It is well to call in mind at this time, the fact that the injunction does not prohibit or prevent the creditor here from having a full, fair and final complete hearing upon whatever claim it may assess. It only prevents this creditor from asserting that claim in a foreign or alien jurisdiction.

To begin with, General Order 47 promulgated in connection with the Bankruptcy Act, provides that, "The findings of fact etc. issued by a referee or special master shall not be disturbed unless they are clearly erroneous."

This rule has been adopted in connection with the findings of refrees in this district in the matter of *Ott v. Thurston* (C. A. 9), 29 A. B. R. (N. S.) 576; 76 F. 2d 368, wherein the court said at page 369:

> "Another error stressed by the appellant is that the judge of the district court erred in holding that where the evidence introduced before the referee in bankruptcy was conflicting, he was not at liberty to disregard the referee's findings. In that connection, the district court stated in its opinion: 'The evidence was at least conflicting, the district court is not at liberty to disregard the referee's finding if they find sufficient support in the evidence.' The court was here expressing the general rule of practice on review or appeal.
>
> "It is the recognized rule of the federal courts—and especially in matters of bankruptcy—that on

review of the decision of a referee, based upon his conclusions on questions of fact, *the court will not reverse his findings unless the same are so manifestly erroneous as to invoke the sense of justice of the court.*"

There are several other cases in this District holding the issuance of a temporary restraining order or an injunction to be well within the proper exercise of the referee's authority. See the cases of *Bakersfield Abstract Company v. Buckley* (C. A. 9), 100 F. 2d 530; in the case of *In re Jersey Island Packing Company* (C. A. 9, 1905), 14 A. B. R. 689; 138 Fed. 625.

POINT FIVE.

The Opinion of the District Judge Supports the Position of Appellant and Contains Findings Which Are Themselves Valid Reasons for the Issuance of a Permanent Injunction.

The opinion written by the learned United States District Judge must be read in its entirety.

Appellant wishes to point out the language of the opinion commencing on page 7, line 24 [Clk. Tr. p. 262 through and including line 18 on p. 8; Clk. Tr. p. 263] which reads as follows:

> "In amending its claim to include the value of the goods which were unaccountably missing, Bonafide represented to the Bankruptcy Court, under oath, that the shortage existed on July 13, 1959, the day of filing the involuntary petition, and that on that day the bankrupt debtor was indebted to Bonafide for their value in the amount stated. Such a claim could have been based upon the Consignment

Agreement provision that the consignee should be responsible for all merchandise not accounted for. The proof of this claim was such as to satisfy the Referee and the claim was allowed. Bonafide invoked the jurisdiction of the Bankruptcy Court for this purpose and thereby submitted to its jurisdiction to try all matters affecting the validity of such claim, including the verity of the representation that said claim had accured on or before July 13, 1959.

The receiver was appointed on July 14, 1959, and in his official capacity as reciever had nothing to do with any of the goods consigned by Bonafide to the debtor before that date. If the loss of the goods had occurred by July 13, 1959, the receiver could not be responsible for their loss. Moreover, if the loss occurred after July 13, 1959, Bonafide's claim and the representations in support thereof were erroneous or false. Jurisdiction to determine whether they were true or false belonged exclusively to the Bankruptcy Court. The Bankruptcy Court exercised this jurisdiction and settled the issue by allowing the claim."

In addition, the United States District Judge wrote as follows on page 9, lines 15 through 21 of his opinion [Clk. Tr. p. 264].

"These claims are in obvious and direct conflict with Bonafide's allowed claim. It appears to be an attempt at piecemeal litigation of a single cause of action. The receiver argues with considerable persuasion in his application for injunction that any action against him should be barred by res judicata and by laches in light of his substantial and prejudicial change of position."

It is most respectfully suggested that the final decision of the United States District Judge is based upon a narrowly isolated concept revolving around the question of whether or not certain property actually or impliedly found its way into the possession or constructive possession of the Receiver or the Court so as to be *in custodia legis.*

This is a new and confining limitation on bankruptcy jurisdiction, although as the undersigned reads the opinion of the Court, it seems to imply that in fact, the Referee did have jurisdiction but that the Court ought to relinquish this jurisdiction to the state courts in order to accomplish the ends of justice.

It would appear to the undersigned that this decision was one which was properly vested in the Referee in Bankruptcy in charge of the case. The Referee's findings and Conclusions and Order ought not to have been disturbed by the District Court.

One further remark concerning the opinion of the United States District Judge should be made in this Brief. The District Judge consistently refers to A. J. Bumb as Receiver and "Trustee" in the Hacker Bankruptcy proceedings. [See pp. 1 and 2 of the Memorandum Opinion of the United States District Judge; Clk. Tr. pp. 256 and 257.]

Nowhere in the record is there any order appointing A. J. Bumb Trustee and this order was specifically requested if any such existed by the undersigned as counsel for the Appellant in connection with the preparation of the Clerk's Transcript. [Clk. Tr. p. 278.] No such order has ever been made part of the record on appeal for the reason that it is believed that none exists.

It is undisputed that A. J. Bumb acted as a mere custodian and did not operate the business of the debtor. The Referee in Bankruptcy so found in Findings of Fact No. 1 [Clk. Tr. p. 240] and the United States District Judge, on page 2 of his Memorandum Decision evidently agreed. [Clk. Tr. p. 257.]

> "On July 13, 1959, an involuntary petition in bankruptcy was filed against the debtor. A. J. Bumb was appointed receiver and became custodian of the assets of the bankrupt on July 14, 1959."

It appears to the undersigned that it is established law by statute and by cases to the effect that a receiver acting as a mere custodian and *not carrying on the business of the debtor* cannot be sued other than in the court of his appointment without the consent of such court. *28 United States Code, Section 959, subdivision(a)* says as follows:

> "(a) Trustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions *in carrying on business connected with such property.* Such actions shall be subject to the general equity power of such court so far as the same may be necessary to the ends of justice, but this shall not deprive a litigant of his right to trial by jury." (Italics supplied.)

While this statute has been quoted by the United States District Judge in his Memorandum Opinion, it is believed by the undersigned that he absolutely misunderstood the implications of the phrase "in carrying on business connected with such property."

A leading case concerning the question of consent and carrying on business is the matter of *Alfred E. Vass, Trustee v. Conron Brothers Co.* (C. A. 2d, 1932), 59 F. 2d 969, an excellent opinion by Learned Hand, Circuit Judge.

This opinion points out the reasoning behind this rule of law. It appears to the undersigned to be most apropos the instant situation.

It is not disputed that the consent of the Bankruptcy Court has never been received insofar as filing an action in the Superior Court by the Appellee is concerned. It seems that such consent far from being given, has been withheld by the issuance of the injunction here under attack.

The matter has been discussed recently in the case of *In re California Eastern Airways, Inc.* (D. C. Del., 1951), 95 F. Supp. 348.

The statute and the reasoning is applicable to trustees in bankruptcy and is applicable as well to receivers.

For the reasons set forth in this Brief, it is respectfully submitted that the opinion of the United States District Judge is erroneous and should be reversed and the order granting a permanent injunction made and entered by the Referee in Bankruptcy should be affirmed and adopted as the rule of this Court.

Dated: This 29th day of August, 1963.

Respectfully submitted,

WILLIAM J. TIERNAN,
Attorney for the Appellant.

Certificate.

I certify that, in connection with the preparation of this brief, I have examained Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WILLIAM J. TIERNAN

No. 18680

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

A. J. BUMB,

Appellant,

vs.

BONAFIDE MILLS, INC.,

Appellee.

APPELLEE'S BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

No. 18680

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

A. J. BUMB,

Appellant,

vs.

BONAFIDE MILLS, INC.,

Appellee.

APPELLEE'S BRIEF.

Statement of the Case.

Appellee does not agree with the Appellant's Statement of the Case and sets forth its own statement.

Prior to the initiation of the bankruptcy proceedings involving R. M. Hacker, Bonafide Mills, Inc., the appellee herein, delivered certain flooring merchandise to the Bankrupt under a consignment agreement. The Bankrupt then executed an assignment for the benefit of creditors to one M. W. Engleman as assignee who, it is claimed, took possession of the merchandise of Bonafide Mills, Inc. Subsequently, an involuntary petition in bankruptcy was filed against R. M. Hacker and A. J. Bumb, the appellant, was appointed receiver. The Bankrupt caused a plan of reorganization to be filed with the Court. While said proceedings were in progress, Bonafide Mills, Inc. filed a Petition in Reclamation in which the consignement agreement was alleged and in which Bonafide Mills, Inc. sought to recover the

merchandise in the possession of the Receiver. [Clk. Tr. p. 52.] The Receiver, A. J. Bumb, turned over to Bonafide Mills, Inc. its merchandise in the value of $97,266.61. After the receipt of these materials Bonafide Mills, Inc. determined there was a shortage of materials in the amount of $16,578.98. The Receiver claimed he had turned over to Bonafide Mills, Inc. all of the merchandise in his possession and the assignee for the benefit of creditors claims it had turned over to the Receiver all of the merchandise of Bonafide Mills, Inc.

Subsequently, an agreement was entered into with respect to the Petition in Reclamation in which the amount of the claim of Bonafide Mills, Inc. was set forth, the Petition dismissed and the right to bring suit for damages was reserved to Bonafide Mills, Inc. [Clk. Tr. p. 193.]

After the filing of said Stipulation, Bonafide Mills, Inc. filed suit in the Superior Court of the State of California against M. W. Engleman, the assignee and against A. J. Bumb, not for the return of the merchandise, but for negligence in allowing the merchandise of Bonafide Mills, Inc. to become lost to the damage of Bonafide Mills, Inc. in the amount of $16,578.98.

Upon the petition of A. J. Bumb, the Bankruptcy Court enjoined Bonafide Mills, Inc. from proceeding with its action against A. J. Bumb in the State Court. This order was made despite the objections of Bonafide Mills, Inc. that the Bankruptcy Court does not have jurisdiction to issue such an order.

One result of the order was that Bonafide Mills, Inc. would have to try its law suit twice, once against M. W. Engleman in the State Court and once against A. J. Bumb in the Bankruptcy Court. Bonafide Mills, Inc. then obtained a review of the Bankruptcy Court Order in the District Court which set aside and vacated the injunction and this appeal followed.

POINT ONE.

Raising Jurisdiction Question in Response to Temporary Restraining Order.

The response filed by Bonafide Mills, Inc. to the temporary restraining order of A. J. Bumb raised the jurisdictional question. A. J. Bumb argues that Bonafide Mills, Inc. never objected to the jurisdiction of the Bankruptcy Court to issue the injunction and argued the matter on its merits. A. J. Bumb argues that the Response of Bonafide Mills, Inc. "goes to the merits of the controversy and does not include an objection to the jurisdiction of the Court". However, it should be pointed out that there was no testimony taken at the hearing before the Referee in Bankruptcy and there was only oral argument as to whether the Court could issue the injunction.

The response filed by Bonafide Mills, Inc. to the Temporary Restraining Order raised the jurisdictional question and was a reply to the points raised in the Application for Temporary Restraining Order filed by A. J. Bumb. The application raised points and cited facts as a purported basis for the Bankruptcy Court

to assume jurisdiction to issue the injunction. Bonafide Mills, Inc. claimed that some of the facts set forth in the Application, which were used as a basis of assuming jurisdiction, were not true and, therefore, Bonafide Mills, Inc., in order to raise the jurisdictional question, filed a Response setting forth its statement of facts. Thus, in order to raise the issue of whether the Bankruptcy Court had jurisdiction, Bonafide Mills, Inc. had to join issue on the facts of the case. An analysis of the Application demonstrates this point.

The Application recites the filing of a creditors claim and the Petition in Reclamation; it asserts that the Petition in Reclamation has not been dismissed, that A. J. Bumb was not a party to the Stipulation to Withdraw the Petition in Reclamation, etc. It was necessary for Bonafide Mills, Inc. to allege facts in its response to show that the Petition in Reclamation was dismissed, that the personal property sold by Bonafide Mills, Inc. was not in *custodia legis,* that the suit in the State Court would not in any manner affect the bankruptcy proceedings but only affected A. J. Bumb personally; that A. J. Bumb filed a final accounting and, therefore, assumed that the Petition in Reclamation was dismissed, etc. [See Response to Order to Show Cause, Clk. Tr. p. 236.]

We, therefore, respectfully submit that the Response of Bonafide Mills, Inc. does raise the jurisdictional question and that this defense has not been waived.

POINT TWO.

Does the Filing of a Proof of Claim and a Petition in Reclamation and the Receipt of Dividends Confer Upon the Bankruptcy Court Jurisdiction to Stay a State Court Action for Negligence Against a Receiver?

It is argued by A. J. Bumb that the acts of Bona-fide Mills, Inc. constitute an election to have all matters heard in the Bankruptcy Court. One such act is the filing of a Creditors Claim and the other is the filing of the Petition in Reclamation. Neither of these acts, separately or together, give to the Bankruptcy Court jurisdiction to determine whether A. J. Bumb is liable personally for negligently losing the property of Bona-fide Mills, Inc. or give to the Bankruptcy Court jurisdiction to enjoin an action in the State Court against A. J. Bumb for damages for such negligence.

The filing of a claim in bankruptcy does not confer upon the Bankruptcy Court jurisdiction to determine all matters which may arise. This consent is limited. In *Nicholas v. Cohn,* 255 F. 2d 301, the court held that the filing of a claim against a bankrupt corporation by a guardian of an estate of his minor daughter in his *individual* capacity did not amount to a consent to summary jurisdiction with respect to a determination of whether the withdrawal of certain funds by the guardian constituted preferential payments.

The cases supporting the rule that the filing of a claim constitutes a consent to jurisdiction are limited to situations where rights to property subject to, or possibly subject to, the jurisdiction of the bankruptcy court are involved. They concern situations in which the trustee in bankruptcy brings a counter-claim or

seeks some affirmative relief against the creditor. No case can be found holding that the filing of a claim by a creditor is a consent to the power of a bankruptcy court to enjoin a suit against the Receiver for negligence. In other words, if a creditor files a claim in bankruptcy for money due, the Bankruptcy Court may hear a counter-claim against the creditor for an overpayment but the filing of the claim would not grant to the Bankruptcy Court jurisdiction to enjoin the Creditor from suing a Receiver for negligently losing the property of the creditor.

Section 23B of the Bankruptcy Act provides:

> "Suits by the Receiver and the Trustees shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this Act had not been instituted, unless by consent of the defendant, except as provided in Sections 60, 67 and 70 of this act."

Most cases of consent are under this section and deal with suits by the trustee. Even under this section, the consent is limited.

The consent provided for in this section was not intended to enlarge the jurisdiction of the District Court so as to give it a jurisdiction which it would not have because of diverse citizenship and a requisite amount in controversy or by reason of a cause of action arising under the Constitution or laws of the United States. *Lovell v. Newman,* 227 U. S. 412; *Coyle v. Duncan Spangler Coal Co.,* 288 Fed. 897; *Kaigler v. Gibson,* 264 Fed. 240; *In re Teschmacher & Mrazay,* 127 Fed. 728; *Fitch v. Richardson,* 147 Fed. 196.

The same reasoning holds true with respect to the Petition in Reclamation filed by Bonafide Mills, Inc. This act would confer jurisdiction to determine title, offsets of the bankrupt and similar questions, but it would not confer the power to enjoin an action brought in a State Court to recover damages for negligence.

The cases cited by A. J. Bumb in his opening brief clearly established the points raised by Bonafide Mills, Inc. herein, that the filing of a proof of claim in bankruptcy does amount to a consent to the summary jurisdiction of the bankruptcy court for certain purposes only but that this does not amount to consent to jurisdiction to any matter whatsoever that may arise in the future.

The consent will confer jurisdiction to hear a counter-claim of the trustee against the creditor, but it will not confer jurisdiction upon the court to restrain an action by the creditor for negligence.

A review of the cases cited by A. J. Bumb will demonstrate this point;

Intra-State National Bank of Kansas City v. Luther, 221 F. 2d 382. A creditor filed a proof of claim. The trustee set up as a counter-claim a preference received by the creditor. The Court held that the creditor had consented to the summary jurisdiction of the Bankruptcy Court to hear this counter-claim.

In re Solar Manufacturing Corporation, 200 F. 2d 327. A creditor filed a proof of claim. The Court held that the Bankruptcy Court had summary jurisdiction to hear a counter-claim of the trustee attacking certain accounts of the creditor.

Columbia Foundry Co. v. Lochner, 179 F. 2d 630. A creditor filed a claim against certain assets in the bankrupt estate and the court held that the Bankruptcy Court had summary jurisdiction to hear a claim of the trustee that the creditor had taken assets of the bankrupt. The case of *Chase National Bank v. Lyford,* 147 F. 2d 273, which also is cited by A. J. Bumb, is also to the same effect.

The case of *In re Nathan,* 98 F. Supp. 686, is also relied upon by A. J. Bumb. In this case a creditor filed a proof of claim in bankruptcy. The Court held that the Bankruptcy Court had summary jurisdiction to hear a counter-claim of the trustee to recover a voidable preference. This case discusses only the question of the summary jurisdiction of the Bankruptcy Court to hear a counter-claim of the trustee. The case can only be cited for establishing the rule on the summary jurisdiction of the Bankruptcy Court to hear such counter-claims. All of the previous cases only deal with the question of a counter-claim by the trustee and because in the instant case on review there is no question of a Receiver filing such a counter-claim, these cases are not in point and are not material to the issue before us.

The next cases cited by A. J. Bumb are more closely related to the problem presented herein.

In re Green, 58 F. 2d 807. The Bankruptcy Court enjoined a State Court proceeding against the trustee individually. The plaintiff in the State Court action had sued the trustee for conversion of personal property. The Circuit Court of Appeals held the injunction was proper because the plaintiff had previously filed a petition in the Bankruptcy Court in which title

to the property was asserted and that issue was decided against the plaintiff. This case clearly turns on the question of *res adjudicata.* The plaintiff had asserted in the Bankruptcy Court that the trustee had in his possession certain property which belonged to the plaintiff. The Bankruptcy Court held that plaintiff did not have such title. Then the plaintiff sued the trustee in the State Court for conversion of the property in selling it in the bankruptcy proceedings. The question of the title in the plaintiff having been already decided adversely against the plaintiff, the Bankruptcy Court enjoined the plaintiff from proceeding in the State Court.

The case *In re Trayna & Cohn,* 195 Fed. 486, which is relied on by the Court in the *Green* case, also turns on the fact that the plaintiff in the State Court attempted to recover the assets in the Bankruptcy Court where the proceeding was decided against the plaintiff, the plaintiff having failed to appear at the time of the hearing and a default having been entered.

The instant case is distinguishable from the foregoing two cases. Bonafide Mills, Inc. had filed a Petition in Reclamation to recover possession of certain personal property. The Receiver returned to Bonafide Mills, Inc. a substantial portion of the property and raised no question as to the right of Bonafide Mills, Inc. to receive it. The Court could not decide the question of the right of Bonafide Mills, Inc. to recover possession of the balance of the property, because the Receiver no longer had possession of the property. The property was lost. Therefore, this matter could no longer be the subject of the petition to recover possession of property. The Petition in Reclamation was dismissed. The receiver filed his final accounting and

closed his books. Bonafide Mills, Inc. then filed its suit in the State Court to recover for the negligence which resulted in the loss of its property. There was no decision in the Bankruptcy Court that Bonafide Mills, Inc. did not have title to the property; there was no decision on the merits. The Stipulation providing for the dismissal of the Petition in Reclamation specifically reserved to Bonafide Mills, Inc. the right to pursue other remedies for the recovery of damages for the negligent loss of the property. This Stipulation was approved by the Bankruptcy Court. The Receiver approved this Stipulation when he filed his accounting.

We, therefor, assert that the filing of a proof of claim in bankruptcy or the filing of a Petition in Reclamation do not constitute a consent to the jurisdiction of the Bankruptcy Court to enjoin an action in the State Court filed against the Receiver in his personal capacity for negligence.

POINT THREE.

The Action Filed by Bonafide Mills, Inc., in the State Court Does Not Impair or Interfere With the Bankruptcy Proceedings.

Bonafide Mills, Inc. takes the position that its action in the State Court does not in any manner effect the bankruptcy proceedings and it will not in any manner change the bankruptcy proceedings.

A. J. Bumb cites various cases to support the proposition that the Bankruptcy Court had jurisdiction to issue this injunction to protect the bankrupt estate and to preserve the bankruptcy proceedings. If we assume for the moment that A. J. Bumb is liable to Bonafide Mills, Inc. for negligence in losing the property of Bonafide Mills, Inc. he would not be able to charge the

estate of the bankrupt for this loss and, therefore, the decision in the State Court would not in any manner alter the proceedings in the Bankruptcy Court and would not alter the distribution to the creditors. It is submitted that there is nothing in this case to protect.

The cases cited by A. J. Bumb as having an excellent discussion on the injunctive powers of the Bankruptcy Court are interesting but they do not support his contentions in this proceeding.

In re Lustron Corporation, 184 F. 2d 789 held that an injunction could issue to restrain an action to foreclose a mortgage in a State Court where the trustee asserted that the mortgages were invalid and the foreclosures would deplete the bankrupt estate and deprive the other creditors of their share of the bankrupt's property. The Court did not enjoin the action to protect the trustee personally, but because the injunction might result in an increase in the assets of the estate and creditors might receive a greater dividend.

This situation does not exist in the instant case.

In each of the cases cited in support of A. J. Bumb's position it will be found that the injunction was issued to preserve the assets in the estate and to prevent a reduction of those assets. This was also true of the two cases cited under Point Two of Appellant's Opening Brief and under Point Two of this reply. Thus in the cases of *In re Green, supra,* and *In re Trayna & Cohn, supra,* the trustee had received permission from the Bankruptcy Court to sell certain personal property. The State Court action was filed against the trustee for wrongfully selling that property. The injunction preserved the orders of the court. In the instant case there is no comparable situation.

POINT FOUR.

The Property of Bonafide Mills Was Not in Custodia Legis.

The first basis for the decision of the Bankruptcy Court in issuing its injunction is set forth in the first Conclusion of Law. [Clk. Tr. p. 239.] There it is stated that the inventory and merchandise of Bonafide Mills, Inc. was in *custodia legis* at all times. The Bankruptcy Court is apparently relying upon the general rule that if the property is in *custodia legis,* this confers summary jurisdiction upon the Bankruptcy Court.

The rule has been set forth in *Collier, Bankruptcy Manual,* Second Edition in Section 23 at page 306 as follows:

> "Generally speaking, where the controversy is one concerning property in the actual or constructive possession of the Bankruptcy Court, that Court may adjudicate summarily all rights and claim pertaining thereto."

This rule would seem to dispose of the matter, however, analysis will show that this rule does not apply to the instant case and consequently the finding will not support the Order of the Bankruptcy Court. The question to be determined is what rights and claims pertaining to the property does the Bankruptcy Court have summary jurisdiction to determine? Does this extend the power of all rights and claims or just some rights and claims?

It is submitted that if the property is in *custodia legis* that this only confers upon the Bankruptcy Court power to determine ownership or claims of liens or an interest in the property; it does not confer jurisdiction

to determine damages for negligence resulting in the loss of the property.

Thus in the case of *Autin v. Piske,* 24 F. 2d 626, the Court held that the Referee in bankruptcy had summary jurisdiction to try a claim by the trustee in bankruptcy to recover property transferred to defraud creditors. In *Zamore v. Goldblatt,* 194 F. 2d 933, the question was whether the Referee in Bankruptcy has summary jurisdiction to sell certain personal property free and clear of a chattel mortgage where the personal property of the bankrupt never came into possession of the mortgagee but remained in possession of the bankrupt and the trustee took possession from the bankrupt. The Court held that the Referee had summary jurisdiction to determine the validity of the mortgage. *In re H. M. Kouri Corporation,* 66 F. 2d 24. In this case the receiver gained exclusive possession of merchandise within the bankrupt's premises under an order voluntarily complied with by a factor who claimed a statutory lien on the merchandise. The factor had consented that the Bankruptcy Court could sell the property and the trustee could hold the proceeds of the sale. The Court held that the Bankruptcy Court had jurisdiction to administer the proceeds and could enjoin a suit by the factor in the State Court to enforce a lien.

These cases are a few examples of all the cases which apply the foregoing rule that confers jurisdiction upon the Bankruptcy Court where it has possession. It is submitted that all cases on this point are cases in which the right to possession, title or lien claims against the property were involved and that there are no cases under this rule permitting the assumption of jurisdic-

tion where a third person sues the receiver personally for damages flowing from negligent acts of the receiver which result in the loss of property belonging to the third person. Almost all cases deal with suits by the trustee to determine questions of title or possession.

In the case of *In re San Clemente Electric Supply,* 101 F. Supp. 252, one Brooks delivered to the bankrupt, before bankruptcy, three water softeners. They were delivered under an oral consignment agreement. The bankrupt entered into a trust receipt transaction with the Bank of America covering the water softeners. After bankruptcy was filed the trustee in bankruptcy took possession of the water softeners, sold them and paid the proceeds to the bank. Brooks then filed suit in the Municipal Court against the trustee and the Bank for conversion. The Referee in Bankruptcy issued a restraining order restraining Brooks from proceeding in the Municipal Court. The action was then tried before the Referee who ruled in favor of the Bank. On appeal Brooks contended that there was no jurisdiction in the Bankruptcy Court. On page 254 the Court states:

> "Brooks attacks the jurisdiction of Bankruptcy Court, but we find this contention without merit. The Trustee came into possession of the property and thereafter under the summary jurisdiction of a Bankruptcy Court, undoubtedly *had jurisdiction to try title to the property. There is some question in the Court's mind as to whether or not the jurisdiction extended further to include the right of the Bankruptcy Court to try the claim for conversion against the trustee and to restrain the prosecution of the Municipal Court action.* However,

> Brooks and the Bank of America, after November 8, 1948, consented to the jurisdiction of the Referee and appeared in the action. Time to review the order of November 8, 1950 (Restraining Order) and all other orders except that of June 27, 1950, expired without petition for review being filed."

We have *italicized* certain portions for emphasis. The case clearly states that possession confers jurisdiction to try questions of title but it is doubtful if any other rights are conferred.

In the case of *Kapan v. Guttman,* 217 F. 2d 481, the Court held that once it had been determined in a summary hearing that the Bankrupt had no interest in the property, the Court had no jurisdiction to determine the rights of third parties to that property. This case turned upon the general rule, a question of title to property, but it does demonstrate that the power of the Bankruptcy Court is limited.

In the instant case, Bonafide Mills, Inc. had filed a Petition in Reclamation to recover its property. A. J. Bumb turned over to Bonafide Mills, Inc. property valued at $97,266.61 without questioning the right of Bonafide Mills, Inc. to receive this property. It is the contention of Bonafide Mills, Inc. that there is no question of what interest Bonafide Mills, Inc. had in the property, the Receiver having recognized this interest when he handed over property to Bonafide Mills, Inc. A. J. Bumb later filed his final accounting and was discharged by the Court. In this accounting he stated that he had no other property. There is, therefore, no property of which the Bankruptcy Court has possession. There is only the question of whether he lost other property of Bonafide Mills, Inc. and is liable

for this loss, which, it is submitted is not a bankruptcy question.

It should be remembered that a Court of Bankruptcy is a Court of limited jurisdiction. *In re Hollins,* 229 Fed. 349. In *Collier Bankruptcy Manual,* Second Edition at page 341 there is a discussion of the jurisdiction of Federal Courts to hear an action against a trustee or a receiver. It is stated that actions against trustees or receivers are of three classes:

> "(1) Suits against the Receiver or Trustee personally for wrongs committed while performing the duties of his office; (2) Suits against the Receiver or Trustee in connection with the carrying on of the Bankrupt's business subsequent to bankruptcy; and (3) Suits against the Receiver or Trustee regarding the property of the bankrupt estate."

It is then stated that suits under (1) and (2) are based upon the ordinary rules of Federal Jurisdiction.

"Actions in class (1) may be brought in a District Court sitting at law or in equity where the requisite jurisdictional grounds are present, just as in any other civil action."

Thus only cases under (3) must be tried in the Bankruptcy Court. Therefore, the fact that A. J. Bumb had possession of the property would not confer jurisdiction upon the Bankruptcy Court to determine whether A. J. Bumb was negligent and caused damage to Bonafide Mills, Inc.

The case of *In re Kalb & Berger Mfg. Co.,* 165 Fed. 895 is a further example of the rule that suits filed against a Receiver personally for wrongs com-

mitted are not within the jurisdiction of the Bankruptcy Court and the Court has no power to enjoin such action in the State Court. In this case an action was filed in the Municipal Court against a Receiver personally to recover upon an agreement for the use of certain premises for storage of the bankrupt estate. The Bankruptcy Court enjoined the prosecution of the action. On page 896 the Court of Appeals states:

> "While ordinarily, a Receiver acting within his powers is not personally liable upon his contracts, yet he may so contract as to bind himself; and if he acts beyond his powers he necessarily assumes individual responsibility. *The action in the Municipal Court, in so far as it was against the defendant personally could not be stayed by the District Court.*" (Emphasis added.)

To the same effect see *In re Kanter v. Cohen,* 121 Fed. 984; *In re Russell,* 101 Fed. 248; *In re Spitzer,* 130 Fed. 879.

On page 345.2 of *Collier Bankruptcy Manual,* Second Edition, the following appears:

> "Where a Receiver or Trustee exceeds his authority he may be sued personnally in a State Court, without leave of the Bankruptcy Court. Likewise, he may be sued in State Court without leave for torts committed in the conduct of the Bankrupt's business. But where the suit is against the Receiver or Trustee in his official capacity concerning the estate, not connected with carrying on the business, leave of the Bankruptcy Court is necessary before a State Court can entertain the suit."

A. J. Bumb did not conduct the business of the Bankrupt, and the action against him does not concern the estate, it concerns the property of Bonafide Mills, Inc. and upon which, it is claimed, A. J. Bumb committed a tort. Therefore, suit may be brought in the State Court.

On page 45 of the same work it is stated:

> "A Receiver is liable personally for acts beyond his authority even when the wrongful acts were in his capacity as an Officer of the Court without personal interest on his part; in such matters he may be sued without the consent of the Bankruptcy Court in a Non-bankruptcy Court. The Bankruptcy Court will not undertake to enjoin such actions, except in the rare situation where the equities of the case may demand it."

There has been no showing that the equities of this case require the issuance of an injunction. The bankrupt estate will not benefit, the creditors will not benefit, only A. J. Bumb personally can possibly benefit. On the other hand, the injunction would be harmful to Bonafide Mills, Inc. Bonafide Mills, Inc. would be required to proceed against A. J. Bumb in the Bankruptcy Court where he contends that he never had possession of property, and he might prevail on that issue; and Bonafide Mills, Inc. would have to proceed in the State Court against the assignee for the benefit of creditors, where he contends that he gave possession of the property to A. J. Bumb, and he might prevail on that issue. It would seem that the equities of the case are in favor of Bonafide Mills, Inc. to enable it to try its law suit once and against both the assignee for the benefit of creditors and A. J. Bumb.

POINT FIVE.

The Appellate Court Is Not Required to Accept the Findings of the Bankruptcy Court.

A. J. Bumb argues that this Court must accept the findings of the Referee. There was no oral testimony taken at the hearing before the Referee. There was only oral argument and a reference to the various documents that are part of the bankruptcy record. All of those matters are before this Court. There is no question of the Referee hearing a witness and judging his demeanor. In this case the entire record is made up of documents. The interpretation of these documents is a question of law and can be reviewed by this Court. Bonafide Mills, Inc. filed its objections to said findings which appear in its Petition for Review of Referee's Order Re Bonafide Mills, Inc. [Clk. Tr. p. 245] in which Bonafide Mills, Inc. objected to the findings and in each instance of the objection, the finding is based upon written documents which can be properly reviewed by this Court. These matters are, therefore, questions of law and not of fact.

POINT SIX.

The Filing of an Amended Proof of Claim by Bonafides Mills, Inc. Does Not Amount to a Waiver or Representation That A. J. Bumb Could Not Be Liable to Bonafide Mills, Inc.

In Point Five of the Opening Brief of A. J. Bumb it is argued that the filing of the amended claim by Bonafide Mills, Inc. constitutes a representation to the Bankruptcy Court that the loss of the merchandise of Bonafide Mills, Inc. occurred prior to the date of filing of the bankruptcy, and, therefore, that A. J. Bumb

had nothing to do with the merchandise. A. J. Bumb now argues this is a basis for enjoining the prosecution of the State Court action.

We disagree with the written opinion of the learned United States District Judge in this respect.

Bonafide Mills, Inc. had filed an amended claim in the amount of $27,590.39. This claim is made up of the sum of $11,011.41 for merchandise sold to the Bankrupt under a consignment agreement and not paid for or returned by the Bankrupt and the further sum of $16,578.98 which is the amount of merchandise sold under consignment agreement and was some of the property sought to be recovered by the Petition in Reclamation.

The District Court Judge in his written opinion states that this claim must speak as of the date of the filing of the Petition in Bankruptcy and thus constitutes a representation to the Bankruptcy Court that on that day, the Bankrupt was indebted to Bonafide Mills, Inc. in the amount of $27,590.39. We agree with this statement. We do not agree that it follows that this also amounts to a representation that A. J. Bumb could not be responsible of the loss of the merchandise in the amount of $16,578.98.

Bonafide Mills, Inc. had filed a Petition in Reclamation to recover merchandise sold under consignment. Quoting from the District Court's opinion on page three thereof,

> "It is admitted that of the merchandise which was the subject of the Petition in Reclamation, $97,-266.61 was returned to Bonafide Mills, Inc. whether by the Receiver of the Trustee (who in fact were one and the same person) does not appear."

The Petition in Reclamation continued to be pressed for the purpose of recovering the balance of the merchandise in the amount of $16,578.98. The Bankrupt had not paid Bonafide Mills, Inc. for said merchandise and he had not returned it to Bonafide Mills, Inc. personally or through the Bankruptcy Court and, therefore, at the time of the filing of the Petition in Bankruptcy, he owed to Bonafide Mills, Inc. the value thereof. Therefore, the amended claim reflected the true status of the claim, that is, that the Bankrupt owed said sum to Bonafide Mills, Inc., but it does not follow that A. J. Bumb could not be responsible for the loss thereof. If A. J. Bumb was responsible for the loss thereof, this would not relieve the Bankrupt from having to account for this merchandise, and if he cannot, then he would still be liable for the value thereof. This fact is also true of the assignee for the benefit of creditors; if the assignee is liable this does not relieve the Bankrupt. We feel that the Stipulation Fixing The Amount Of Unsecured Claim, etc. clearly reflects that Bonafide Mills, Inc. intended to keep alive its claim against all persons who might be responsible for the loss of the merchandise. The Bankruptcy Court also recognized that this right was being retained and expressly consented to it in its Order which reads as follows:

> "IT IS FURTHER ORDERED, ADJUDGED AND DEEMED THAT THE Petition in Reclamation heretofore filed herein by Bonafide Mills, Inc. be dismissed without prejudice to the right of said Bonafide Mills, Inc. to pursue any remedy it desires against any person, firm or corporation for the purpose of asserting a claim for damages for

the loss of the consigned merchandise in the amount of $16,578.98, and that with reference to said amount represented by said consigned merchandise 60% of all cash payments received by Bonafide Mills, Inc. shall be applied in the reduction of said claim."

Thus there has been no change of position by Bonafide Mills, Inc. and no misrepresentation by Bonafide Mills, Inc. to the Bankruptcy Court. It is the opinion of Bonafide Mills, Inc. that the Bankrupt does owe to it the total sum of $27,590.39 but it was represented that other persons may also have an obligation to pay a portion of this claim. If the Bankrupt Hacker should pay this claim, then this should reduce the possible liability of other persons and the Stipulation so provides.

We, therefore, respectfully submit that the Bankruptcy Court does not have jurisdiction to issue the injunction herein and that Bonafide Mills, Inc. should be permitted to proceed with its action in the State Court.

BROWN & BROWN,
By MAYNARD J. BROWN,
Attorneys for Bonafide Mills, Inc.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliancy with those rules.

MAYNARD J. BROWN

No. 18,681

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HEINRICH FRITZ BACHMANN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the United States District Court for the Southern District of California, Central Division.

BRIEF FOR APPELLANT.

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TABLE OF AUTHORITIES CITED

No. 18,681

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HEINRICH FRITZ BACHMANN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the United States District Court for the Southern District of California, Central Division.

BRIEF FOR APPELLANT.

Jurisdictional Statement.

This is an appeal from a judgment entered on April 3, 1963 by the United States District Court for the Southern District of California, Central Division, denying appellant's petition for naturalization [R. 63]. The petition for naturalization was brought to the United States District Court as a naturalization court under the authority of 8 U. S. C. A. 1421(a). The District Court's judgment of April 3, 1963, as a final order, is appealable to the United States Court of Appeals for the Ninth Circuit pursuant to the authority of 28 U. S. C. A. 1291, which provides that courts of appeals have jurisdiction of appeals from all final decisions of district courts. Appellant, on April 10,

1963, filed in the District Court a timely Notice of Appeal [R. 64] under 28 U. S. C. A. 2107 which was docketed in the United States Court of Appeals for the Ninth Circuit on May 21, 1963. This Court's jurisdiction therefore rests upon 28 U. S. C. A. 1291.

Statement of the Case.

This is a naturalization proceeding by Heinrich Fritz Bachmann to become a United States citizen.

Bachmann filed his petition for naturalization on January 3, 1962 [R. 2] under the general provisions Section 316 of the Immigration and Naturalization Act of 1952, 8 U. S. C. A. 1427. This act is hereinafter referred to as the INA. The designated examiner made his recommendation [R. 2-8] to the naturalization court, in this case the United States District Court for the Southern District, Central Division, on February 8, 1963, that said petition be denied on the ground that petitioner has failed to establish that he is not ineligible for citizenship by virtue of Section 315 of the INA because he has applied for and has been relieved from military service in the armed force of the United States because of alienage.

On March 18, 1963 the case was heard in the United States District Court for the Southern District, Central Division [R. T. 3-13]. The Court followed the recommendation of the naturalization examiner and denied the petition on the ground that petitioner has failed to establish that he is not ineligible for citizenship by virtue of Section 315 of the INA because he has applied for and has been relieved from military service in the armed force of the United States because of alienage. Findings of Fact, Conclusions of Law and

Judgment were filed on April 3, 1963 and the Judgment was entered on the same date [R. 62-63].

On April 10, 1963 a Notice of Appeal [R. 64] was filed by petitioner, and the case has now been brought for determination to the above entitled Court.

Statement of Facts.

Heinrich Fritz Bachmann, who had a record as a conscientious objector in Switzerland, his native country [Govt. Ex. C, 1-N, p. 2], was approved by the State Department for admittance to the United States as a permanent resident and arrived in this country on December 22, 1952 when he was twenty-five years of age.

On February 23, 1954 the Selective Service System refused to grant Mr. Bachmann permission to leave the United States on the ground that he was then subject to military service [Pet. Ex. A, R. 51].

The Immigration and Naturalization Service now wishes to deny citizenship to Mr. Bachmann because on a date prior to February 23, 1954 he had written a letter requesting exemption from military service as a treaty alien [R. 14].

To understand the events and happenings involved in this case we must go back to a date prior to Mr. Bachmann's entry into the United States. After the Second World War he had the opportunity to observe the devastation of postwar Europe which reinforced his religious convictions and led him, in the years 1949 and 1950 to refuse service in the Swiss Army in peacetime, and, as Switzerland has no provisions for conscientious objectors, he served his compulsory service

time in jail rather than in a training camp [Govt. Ex. C, 1-N, p. 2].

After his arrival in the United States and his registration with the Selective Service System, Bachmann was classified as I-A in July of 1953 [Govt. Ex. C, 1-C]. He did not officially bring up his conscientious objector beliefs at this time because he did not believe he would actually be called for induction, and, after his experiences in Switzerland, he was not anxious to reveal his principles unless it became absolutely necessary [R. 18].

In the fall of 1953 Mr. Bachmann inquired, through his Congressman, of Lewis B. Hershey, Director of the Selective Service System, as to how a classification as a treaty alien would affect his future ability to become a United States citizen. He was informed on October 6 by Mr. Hershey that it "might" make him permanently ineligible [Pet. Ex. D, R. 54].

On October 7 Mr. Bachmann appeared at the New York headquarters of the Selective Service System to initiate his request to be classified as a conscientious objector. However, after an interview with Colonel Akst he decided instead to write to his draft board a letter requesting IV-C status as a treaty alien [Pet. Ex. E, R. 55]. This he did on October 9, 1953, delivering his letter in person [R. 22], and being handed in return a blank form entitled "Application by Alien for Exemption from Military Service in the Armed Forces of the U.S.", which he discovered, probably that same evening, to contain on its bottom half the provisions of Section 315 INA [Govt. Ex. C, 1-C, 1-G1].

On October 14 the notice of his classification as a treaty alien was mailed to him, but before such classi-

fication became final, he filed a Notice of Appeal [Govt. Ex. C, 1-K] requesting to be classified I-0 as a conscientious objector, and requesting a personal interview to clarify his position. He was then mailed the form 150 required of conscientious objector claimants, which he filled out and returned [Govt. Ex. C, 1-N, pp. 1-4], and appeared before the board in person on November 24, 1953. The board the same day, by a vote of 5-0, decided the information did not warrant reopening the case and forwarded it to the appeal board [Govt. Ex. C, 1-C].

The appeal board, on December 29, 1953, acting on Bachmann's appeal for change of classification from IV-C to I-0, reclassified him V-A by a vote of 5-0 [Govt. Ex. C, 1-C, p. 2].

The next significant date is the one previously mentioned, when on February 23, 1954 his local draft board denied him permission to leave the United States.

Specification of Errors Relied On.

1. The District Court erred in finding that appellant was relieved from training and service in the armed forces of the United States because of alienage.

2. The District Court erred in placing the burden of proof of eligibility for citizenship, in reference to Section 315, Immigration and Naturalization Act of 1952, on the petitioner.

3. The District Court erred in failing to make specific findings of fact as to whether under the facts of the case appellant had the opportunity to make an intelligent election between exemption and no citizenship, and no exemption and citizenship, and as to whether appellant was a conscientious objector.

4. The District Court erred in failing to find that appellant, as an alien in permanent residence, was not entitled to exemption from military service as a treaty alien, and that therefore Section 315 INA is not applicable to him.

Questions Presented.

1. Was Bachmann, who timely appealed his IV-C classification, requesting I-O classification, and who as a result of such appeal was re-classified V-A, and who subsequently was denied permission by his draft board to leave the United States, relieved from military service as a treaty alien?

2. Was Section 315 INA a penalty, and if so was Bachmann deprived of due process by having the trial court impose on him the burden of proof to show that he did not violate Section 315 and that therefore he was eligible for citizenship.

3. A. Was Bachmann given the opportunity to make an intelligent election between military service and citizenship and exemption from service and no citizenship?

B. Was Bachmann a conscientious objector and therefore entitled to exemption from military service because of his religious beliefs?

4. Was Bachmann, who was admitted to the United States as a permanent resident, entitled to exemption from military service as a treaty alien?

ARGUMENT.

I.

Heinrich Fritz Bachmann Was Never Relieved From Military Service as a Treaty Alien.

After the series of events referred to in appellant's Statement of Facts, and after receiving his IV-C classification on October 14, 1953, Bachmann became alarmed as to the consequences of such classification [R. 23], and filed his appeal for reclassification to I-O on October 23. This appeal was then considered by the appeal board.

32 C. F. R. Section 1626.25 contains the special provisions governing an appeal which involves a claim that the registrant is a conscientious objector, and reads in part, as it was in force at that time:

> "(a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall take the following action:
>
> (3) . . . the appeal board shall first determine whether or not the registrant is eligible for classification in a class lower than Class I-0. If the appeal board finds that the registrant is not eligible for classification in a class lower than Class I-0, but does find that the registrant is eligible for classification in Class I-0, it shall place him in that class.
>
> (4) If the appeal board determines that such registrant is not entitled to classification in either a class lower than Class I-0 or in Class I-0, it shall transmit the entire file to the United States Attorney for the judicial district in which the of-

> fice of the appeal board is located for the purpose of securing an advisory recommendation from the Department of Justice."

It is clear from the record that the board decided to classify Bachmann V-A, a classification which does not exempt from military service but makes the registrant eligible for service if the conditions so require. This is corroborated by the fact that two months later he was refused permission to leave the country by his draft board.

If the appeal board wished to refuse Bachmann's appeal, it could have indicated in the record that he was a treaty alien exempt from military service, in which case, as a Swiss citizen, he should not have been barred from leaving the United States.

The government should be estopped from now claiming that Bachmann should be barred from citizenship as a treaty alien because of a mere attempt on its part to classify him IV-C.

II.

Section 315 INA Is a Penalty Clause and as Such Required the Safeguards of the Fifth and Sixth Amendments to the United States Constitution, and It Was a Denial of Due Process to Impose on Bachmann the Burden of Proof to Show That He Did Not Violate Said Clause.

In the case of *In re Naturalization of Browne* (1962), 180 A. 2d 911 on page 912 the Court states in reference to Section 315:

> "It is obvious that for a permanent resident in this country to be declared permanently ineligible for United States citizenship is a grave matter

indeed. It is like telling someone who lives in the country that he may not fill his lungs to the utmost with fresh air. It must be a knell of doom constantly sounding in the ears of a permanent American resident that he may not breathe fully the air of liberty and opportunity which everybody else may enjoy. Thus, considering the solemn sanctions involved through application of the statute in question, it must be construed strictly.

Judge Hastie, United States Circuit Court Judge of the Third Circuit, well said that:

'The deprivation of the privilege of acquiring citizenship, which an alien in permanent residence normally enjoys, is a substantial penalty. A statute which attaches such a penalty to certain conduct *should be construed strictly to avoid an imposition which goes beyond the manifest intent of Congress.*' (Emphasis supplied.) (Petition of Rego, 3 Cir., 289 F. 2d 174.)"

Here we have two Courts which consider said statute to be a penalty.

In the case of *McGrath v. Kristensen* (1950), 340 U. S. 162 [71 S. Ct. 224], where the United States Supreme Court refers on page 172 to a clause barring an alien from citizenship on the ground that he requested an exemption from military service, the Court labels it a "penalty clause."

In the case of *Kennedy v. Mendoza-Martinez* (1963), 372 U. S. 144 [83 S. Ct. 554], the court discusses the test as to whether an Act of Congress is penal or regulatory in character on pages 168-169:

"Whether the sanction involves an affirmative disability or restraint, whether it has historically been

> regarded as a punishment, whether it comes into play only on a finding of *scienter,* whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions. Absent conclusive evidence of congressional intent as to the penal nature of the statute, these factors must be considered in relation to the statute on its face."

It seems that in the instant case the punitive nature of the statute is obvious on its face, and, in addition, it meets the test as outlined above. This conclusion in regard to Section 315 has been reached by the courts in the *Petition of Rego* (1961), 289 F. 2d 174, and *In re Petition of Browne, supra.*

The Supreme Court in the *Kennedy v. Mendoza-Martinez* case, *supra,* held that once having established that an Act of Congress is penal in nature, then the safeguards of the Fifth and Sixth Amendments to the United States Constitution—that a prior criminal trial with all its incidents must be complied with before the sanctions of such a section be imposed—are mandatory.

In the instant case, not only has Bachmann been deprived of the procedural safeguards required as incidents of a criminal prosecution, but the trial court has imposed upon Bachmann the burden of proving that he is not ineligible to become a citizen by virtue of Section 315 of the INA [R. 63].

III.

Appellant Had No Opportunity to Make an Intelligent Election Between Exemption and No Citizenship, and No Exemption and Citizenship, and Furthermore, as a Conscientious Objector, He Was Entitled to Be Exempt From Military Service Because of His Religious Beliefs.

In the case of *Moser v. United States* (1951), 341 U. S. 41 [71 S. Ct. 553], speaking for the Court, Justice Minton said:

> "Petitioner did not knowingly and intentionally waive his rights to citizenship. In fact, because of the misleading circumstances of this case, he never had an opportunity to make an intelligent election between the diametrically opposed courses required as a matter of strict law. Considering all the circumstances of the case, we think that to bar petitioner, nothing less than an intelligent waiver is required by elementary fairness. Johnson v. United States, 318 U. S. 189, 63 S. Ct. 549, 553, 87 L. Ed. 704. To hold otherwise would be to entrap petitioner."

The Court in the *Moser* case demands that *scienter* must be present before Section 315 INA can be invoked. It is appellant's position that the trial court failed to make a finding on this point, even though this issue was raised by Bachmann.

The record indicates that Bachmann, after having been classified I-A, inquired through his congressman of Lewis B. Hershey, Director of Selective Service, as to whether classification as IV-C would bar him from citizenship. Mr. Hershey's letter dated October 5 to Mr. Holtzman [R. 53-54] states that such ap-

plication and relief on such ground "might" permanently bar him from citizenship.

Bachmann went to Selective Service headquarters in New York on October 7, 1953 to initiate his request to be classified as a conscientious objector. During his lengthy interview with Colonel Akst, he expressed his opinion that he was entitled to a IV-C classification as a treaty alien but he refused to sign the statement on the form being provided by the local boards. He was then advised he could also be classified IV-C if he writes his own statement, but that he would then be either given or mailed Section 315 of the INA [R. 55].

On October 9 he filed, in person, with the clerk of the local draft board, his request for IV-C classification and was handed a blank form 294 which contains on the lower half Section 315 of the INA. He did not look at the paper at that time but read it at home, probably the same evening [R. 22].

In his deposition, in reference to his reading Section 315 of the INA, the following question and answer is found [R. 23]:

> "Q. Did you, in reading this statement, realize that you would be barred from citizenship because of your request for an exemption? A. I was not sure because I had previously been told that you would be barred from citizenship if you signed the form, but not having signed the form I did not know what the consequences might be. During a visit to the Selective Service Head Office in New York, while discussing my military status, Colonel AKST indicated that my request for exemption, dated October 9, 1953, would not necessarily bar me from citizenship as it would if I were signing the prescribed form."

This statement is uncontroverted by the government.

The evidence shows that Bachmann was uncertain as to the consequences of his letter requesting exemption as a treaty alien, but that after reading Section 315 INA he became concerned, and as a result filed his Notice of Appeal for change of classification to I-O.

The facts of the case prove that Bachmann's attempts to change his status from I-A classification were motivated by his religious beliefs as a conscientious objector, but the Court fails to make any specific finding as to whether Bachmann was a conscientious objector.

The evidence further proves that at the time he applied for IV-C classification he did not have sufficient information to make an intelligent waiver of his right to citizenship as required by the *Moser* case, *supra.*

In the case of *Brunner v. Del Guercio* (1958), 259 F. 2d 583, the Court held on page 586 that in naturalization proceedings where the issue arises as to whether the petitioner knowingly and intentionally waived his rights to citizenship by claiming exemption from the armed forces, a finding on that issue by the District Court is essential. In the case at bar the District Court made no such finding, but the overwhelming weight of evidence can support only one finding—that Bachmann had no opportunity to make an intelligent election as outlined in the *Moser* case.

IV.

Permanent Resident Aliens Are Treated Like Citizens in That They Have the Same Unqualified Obligation to Render Military Service as Do Citizens.

It is an admitted fact that Bachmann has been a permanent resident of the United States since December 22, 1952. Conclusion of Law No. 1 [R. 63] is erroneous in that it refers to appellant as a resident alien, and is inconsistent with Finding of Fact No. 2 [R. 62] which states that petitioner was admitted for permanent residence.

Assuming without conceding that Bachmann was exempted from military service, it is appellant's contention that a permanent resident cannot claim exemption as a treaty alien, and that if he has been erroneously exempted by the government, he should not be penalized for knowing less about the Selective Service System than the Selective Service System itself.

In the case of *In the Matter of the Petition of Rego, supra,* the Court held that permanent residents cannot claim exemption as treaty aliens, and the Court stated, in regard to the fact that the local draft board for a time classified Rego as exempt from military service, on page 177:

> "But for present purposes this temporary disregard of the selective service law is of no consequence. All that matters is that Dominguez Rego was not a member of that class of aliens 'in the United States in a status other than that of a permanent resident', to which the proviso imposing debarment from naturalization applied."

Clearly the statute classifies all permanent residents in the same category as citizens in regard to their obligation to render military service.

Since Bachmann was not legally entitled to be relieved from military service, then is the fact of relief sufficient to bring into effect Section 315 INA? Our answer is no. A statute either does apply or does not apply to a given fact situation. For example, in the *Rego* case, *supra,* the Court on page 177 states:

> "However, the government urges that the court below should be given an opportunity to consider 'the effect of the subsequent service in the Armed Forces of the United States' on the rights of the appellant. Such reconsideration in the court below would be pointless in the light of our ruling that Section 315 (a) is not controlling in the agreed circumstances of this case."

By analogy, how can the penalties of Section 315 be invoked against the appellant who is clearly not a member of the class of persons to whom said statute is applicable?

We recognize that in the case of *Ungo v. Beechie* (1963), 311 F. 2d 905 this Court holds that it is the fact of relief, not the legal right to it, that is determinative, but we respectfully request that this position be reconsidered, especially in the light of the penal nature of the statute.

In view of the penal nature of Section 315 INA, the statute should be strictly construed and its sanctions not imposed on the appellant, who is not within the class for whom the statute was designed.

Conclusion.

For the reasons stated, it is respectfully submitted that the District Court's judgment denying appellant's petition for naturalization be reversed, and the cause remanded with the instructions that the appellant be admitted to United States citizenship.

Dated, Los Angeles, California, October 31, 1963.

Respectfully submitted,

MILAN MOACANIN,
Attorney for Appellant.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: October 31, 1963.

MILAN MOACANIN,
Attorney for Appellant.

TABLE OF EXHIBITS.

Exhibit	Record Page	Reporter's Transcript Page
Petitioner's #A (letter from local board denying Bachmann permission to depart from U. S.)	51	12-13
Petitioner's #B (letter from I & N Service to Bachmann re: reentry permit)	52	12–13
Petitioner's #C (letter from Lester Holtzman, Congressman, to Bachmann)	53	12–13
Petitioner's #D (letter from Lewis B. Hershey to Lester Holtzman)	54	12-13
Petitioner's #E (letter from Candler Cobb to Lester Holtzman)	55	12–13
Government's #A (deposition of Bachmann)	9–30	10
Government's #B (preliminary application of Bachmann)	to be used in original form	10
Government's #C (Selective Service file of Bachmann)	to be used in original form	10–11

No. 18681

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HEINRICH FRITZ BACHMANN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

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Statutes

No. 18681

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HEINRICH FRITZ BACHMANN,

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Appellee.

BRIEF FOR APPELLEE.

Jurisdiction.

The court below had jurisdiction of appellant's petition for naturalization pursuant to Section 310(a) of the Immigration and Nationality Act, 8 U. S. C. A. §1421(a). On April 3, 1963 the District Court entered its judgment [R. 63][1] denying appellant's petition for naturalization, and on April 10, 1963 appel-

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[1]The Transcript of Record filed in this Court on May 17, 1963 consists of two Volumes. Volume I is numbered consecutively from pages 1 through 74, and "R" refers to these page numbers. All of appellant's exhibits are contained in Vol. I of the Transcript of Record [R. 51-55]; and Exhibit "A" of appellee is also contained in this volume [R. 2-8].

Exhibits "B" and "C" of appellee are not contained in the Transcript of Record, but are being considered by this Court in their original form. Contained in Exhibit "C" are records of the Selective Service System relating to appellant, which records have been marked Exhibits 1-A [or 1 (A)] through 1-N [or 1 (N)]. The Selective Service Exhibits contained in Exhibit "C" will be indicated "SS Ex. 1-B", "SS Ex. 1-C", etc.

lant filed a Notice of Appeal therefrom [R. 64]. This Court has jurisdiction of the present appeal pursuant to Title 28, U. S. Code, Section 1291.

Appellant was born in Zurich, Switzerland on November 4, 1927 [R. 10]. He was admitted to the United States for permanent residence on December 27, 1952 [Ex. B, Item 9]. At the time of his admission appellant was able to read, write, and speak English, having studied English in school, and having been employed in Switzerland as a passenger or ticket agent with an airline, where as a part of his duties he carried on conversations with passengers in English when necessary [R. 10-11]. After entering the United States appellant resumed his duties as ticket agent with the airline [R. 11].

On June 19, 1953 appellant registered for the draft, and on July 7, 1953 he was classified I-A [SS Exs. 1-B and 1-C]. On August 24, 1953 appellant reported for physical examination and was found qualified for service in the armed forces [SS Ex. 1-C].

On September 10, 1953 appellant wrote a letter to his local draft board, which, among other things, quoted from the treaty between the United States and Switzerland providing that "the citizens of one of the two countries, residing or established in the other, shall be free from personal military service", requested exemption from military service, and suggested a personal appearance before the Board [SS Ex. 1-D].

On September 18, 1953 appellant was notified to appear for an interview on September 22, 1953 [SS Ex. 1-C]. Appellant appeared on the latter date but did not sign the statement requesting exemption as a treaty alien, stating that he could not decide whether or

not to sign the statement, but that he would advise the Board by letter in a few days [SS Exs. 1-C and 1-E].

On October 2, 1953 appellant was ordered to report for induction on October 19, 1953 [SS Exs. 1-C and 1-F]. Meanwhile, appellant had written to Representative Lester Holzman concerning his induction, which letter had been referred to National Headquarters, Selective Service System. On October 5, 1953 Lewis B. Hershey, Director, Selective Service System, replied to Representative Holzman, which letter, among other things, referred to Section 315 of the Immigration and Nationality Act[2] and its provisions.

On October 6, 1953 Representative Holzman wrote to appellant enclosing a copy of the letter which he had received from Mr. Hershey, and suggesting that his case be discussed with the State Director of Selective Service in New York City [R. 53]. On October 7, 1953 appellant appeared at the office of the State Director. This interview is summarized in a letter dated October 8, 1953 to Representative Holzman, which states in part [SS Ex. 1-G]:

> "* * * After a long talk with Mr. Bachmann, he finally advised Colonel Akst that he thought he was entitled to a IV-C classification based upon his Swiss alien status in view of the international treaty existing between our nations. However, he refused to sign the statement the Local Board has been using for all treaty aliens. He was thereupon advised that he could make up his own statement and he would be eligible for a IV-C classification

[2]For brevity Section 315 of the Immigration and Nationality Act will sometimes be referred to hereinafter as 315 INA.

> but that he would be either given or mailed the Section 315 of the McCarran Act. Also, his file would reflect that he was given the IV-C classification based upon his treaty status *and he was apprised of the aforementioned section.*" (Emphasis added.)

On October 9, 1953 appellant filed in person with his local draft board a letter which read as follows [SS Ex. 1-H]:

> "I am a Swiss alien who desires exemption from military service on the ground that I come from a country with which the United States has a treaty exempting its subjects."

At the time that appellant filed the above quoted letter he was given a copy of Section 315 of the Immigration and Nationality Act [SS Ex. 1-C].

On October 13, 1953 appellant was classified IV-C and by letter dated October 14, 1953 appellant was advised by his local board "that by reason of your reclassification to 4-C, your Order To Report for Induction on October 19, 1953 is hereby cancelled: [SS Exs. 1-C and 1-I].

On October 15, 1953 appellant appeared at his local board and asked if he would be classified 5-A upon reaching his 26th birthday and was told that he would. He also said, among other things, that he wanted to be classified as a conscientious objector [SS Ex. 1-J].

On October 23, 1953 appellant wrote a letter to his local board in which he stated, *inter alia,* that "I herewith appeal to you to change my classification to I-O

by reason of the fact that I am a conscientious objector" [SS Ex. 1-K]; and he later completed and sent to his local board a Special Form For Conscientious Objector [SS Ex. 1-N]. On November 24, 1953 the local board determined that "Information does not warrant reopening" [SS Ex. 1-C], and on December 7, 1963 forwarded appellant's file to the appeal board [SS Ex. 1-L]. Meanwhile, on November 4, 1953 appellant had become 26 years of age; and on December 29, 1953 the Appeal Board classified him 5-A [SS Ex. 1-L]. At no time has appellant entered or served in the armed forces of the United States [R. 24, 25].

On January 3, 1962 appellant filed in the court below his petition for naturalization. The naturalization examiner recommended that the petition be denied [R. 8]; and the District Court, after a trial, entered its Findings of Fact, Conclusions of Law and Judgment [R. 62-63], denying appellant's petition for naturalization on the ground that he had "failed to establish that he is not ineligible for citizenship by virtue of the provisions of Section 315 of the Immigration and Nationality Act" [R. 63]. The present appeal is from that judgment.

Issues Presented.

1. Was appellant relieved from training or service in the Armed Forces of the United States because he was an alien?

2. Did the District Court err in placing the burden upon appellant to establish that he was eligible for naturalization under Section 315 INA?

3. Were the safeguards of the Fifth and Sixth Amendments to the Federal Constitution required in determining whether appellant was eligible for naturalization under Section 315 INA?

4. Did appellant have an opportunity to make an intelligent election between exemption and no citizenship, and no exemption and citizenship?

5. Were the findings of the District Court sufficient?

6. Was appellant entitled to exemption from military service as a treaty alien?

7. If appellant was not entitled to exemption as a treaty alien, is Section 315 INA nevertheless applicable?

Treaties, Statutes and Regulations.

Article II of the Treaty of 1850 between the United States and Switzerland, 11 Stat. 587, 589, provides in part:

> "The citizens of one of the two countries, residing or established in the other, shall be free from personal military service; but they shall be liable to the pecuniary or material contributions which may be required, by way of compensation, from citizens of the country where they reside, who are exempt from the said service.
>
> * * *"

Section 315 of the Immigration and Nationality Act, 66 Stat. 242, 8 U. S. C. A. §1426, provides:

> "Sec. 315. (a) Notwithstanding the provisions of Section 405 (b), any alien who applies or has

applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States.

(b) The records of the Selective Service System or of the National Military Establishment shall be conclusive as to whether an alien was relieved or discharged from such liability for training or service because he was an alien."

Executive Order No. 10292 of September 25, 1951, 16 F. R. 9843, 9852, 32 C. F. R. §1622.42, and §1622.50 provided in part:

"§1622.42 Class IV-C: *Aliens.* * * *

(c) In Class IV-C shall be placed any registrant who is an alien and who is certified by the Department of State to be, or otherwise establishes that he is, exempt from military service under the terms of a treaty or international agreement between the United States and the country of which he is a national.

* * *

"§ 1622.50 Class V-A: *Registrant over the age of liability for military service.* (a) In Class V-A shall be placed every registrant who has attained the twenty-sixth anniversary of the day of his birth, except (1) those registrants who are

in active military service in the armed forces and are in Class I-C, (2) those registrants who are performing civilian work contributing to the maintenance of the national health, safety, or interest in accordance with the order of the local board and are in Class I-W, (3) those registrants who have consented to induction, and (4) those registrants who on June 19, 1951, or at any time thereafter, were deferred under the provisions of section 6 of title I of the Universal Military Training and Service Act, as amended. Except as is otherwise provided in this paragraph, registrants who prior to attaining the twenty-sixth anniversary of the day of their birth have been classified in some other class shall, as soon as practicable after attaining the twenty-sixth anniversary of the day of their birth, be reclassified into Class-V-A.

* * *"

ARGUMENT.

I.

Appellant Was Relieved From Training and Service in the Armed Forces Because He Was an Alien.

The records of the Selective Service System show that on October 2, 1953 appellant was ordered to report for induction on October 19, 1953 [SS Exs. 1-C and 1-F]; that on October 9, 1953 he applied for exemption from military service on the ground that he was a treaty alien [SS Ex. 1-H]; that on October 13, 1953 he was classified IV-C [SS Ex. 1-C]; and that by letter dated October 14, 1953 he was notified "that by reason of your re-classification to 4-C your Order to Report For Induction on October 19, 1953 is hereby cancelled" [SS Ex. 1-I]. These records also show that appellant remained in a IV-C classification from October 13, 1953 until December 29, 1953, when he was classified V-A [SS Exs. 1-B, 1-C, and 1-L]. Appellant admits that he has never served in the armed forces of the United States [R. 24, 25].

The records of the Selective Service System are conclusive as to whether an alien was relieved from liability for training or service because he was an alien [§315(b) of the Immigration and Nationality Act; 8 U. S. C. A. §1426(b)]; and appellee submits that under the circumstances of the present case appellant was so relieved [*Cf. Petition of Skender,* 248 F. 2d 92 (2d Cir. 1957), cert. den. 355 U. S. 931]. As this Court in *Ungo v. Beechie,* 311 F. 2d 905 (9th Cir. 1963), cert. den. 373 U. S. 911, declared (p. 906):

> "* * * factually speaking, the action by the draft board in classifying petitioner in category IV-C as a treaty alien relieved him of service in the army * * *"

Appellant's so-called appeal[3] and his later classification on December 29, 1953 to V-A will not aid him. In the first place, it is doubtful whether appellant's letter of October 23, 1953 [SS Ex. 1-K] constituted a proper appeal; since it sought a classification as a conscientious objector, which had not previously been sought before the local board. It should be noted that the local board felt that reopening was not warranted [SS Ex. 1-C; see also 32 C. F. R. Part 1625 concerning Reopening].

In the second place, after appellant attained the age of twenty-six he was required by law to be placed in Class V-A. On December 29, 1953, 32 C. F. R. 1622.50 provided in part:

> "* * * Except as is otherwise provided in this paragraph, registrants who prior to attaining the twenty-sixth anniversary of the day of their birth have been classified in some other class shall, as soon as practicable after attaining the twenty-sixth anniversary of the day of their birth, be reclassified into Class V-A."

Appellant reached his 26th birthday on November 4, 1953; consequently, on December 29, 1953 when the appeal board rendered its decision, his appeal had in effect become moot; since under the above-quoted regulation appellant was required by law to be classified V-A. Thus the decision of the appeal board

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[3]Appellant filed this "appeal" [SS Ex. 1-K] after he had been informed that he would be classified V-A upon reaching his 26th birthday [SS Ex. 1-J].

merely reflected this mandatory requirement[4]; and the provisions of 32 C. F. R. 1626.25 upon which appellant relies (Br. 7-8) do not appear to be relevant.[5]

Appellant seems to contend (Br. 8) that the refusal during February, 1954 of a permit for him to leave the United States [R. 51-52] shows that he was not relieved of training or service. This argument presupposes that one so relieved is beyond all jurisdiction of the Selective Service laws. This would not seem to be true. Even if appellant had continued in Class IV-C, he would nevertheless have remained a registrant; and as such would appear to come within 32 C. F. R. 1621.-16 regulating permits to leave the United States.

In any event, the refusal of a permit to leave the United States is a far cry from those decisions which hold that an alien who actually serves in the armed forces, after having previously been classified as exempt upon his application, has not been effectively relieved from service [*United States v. Lacher,* 299 F. 2d 919 (9th Cir. 1962); *Petition of Rego,* 289 F. 2d 174 (3d Cir. 1961); *Cannon v. United States,* 288 F. 2d 269 (2d Cir. 1961); *United States v. Hoellger,* 273 F. 2d 760 (2d Cir. 1960)]. Appellant cannot bring himself within those decisions; since at no time has he served in the armed forces of the United States [R. 24, 25].

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[4]The appeal board had authority to make this required classification [See, 32 C. F. R. 1626.26].

[5]The court will note that the provisions of 32 C. F. R. 1626.25 quoted by appellant (Br. 7-8) were modified by Executive Order 10363 17 F. R. 5449, June 18, 1962.

II.

The District Court Did Not Err in Placing the Burden Upon Appellant to Establish That He Was Eligible for Naturalization Under Section 315 INA, and the Safeguards of the Fifth and Sixth Amendments Were Not Required.

Appellant contends that there was a denial of due process in placing the burden upon him to establish that he was eligible for naturalization under Section 315 INA. However, it is well established that the burden rests upon an applicant to establish that he has met the statutory qualifications to entitle him to the privilege of naturalization. [*United States v. Macintosh,* 283 U. S. 605 (1931); *United States v. Schwimmer,* 279 U. S. 644 (1929); *Sitler v. United States,* 316 F. 2d 312 (2d Cir. 1963); *Taylor v. United States,* 231 F. 2d 856 (5th Cir. 1956); *Allan v. United States,* 115 F. 2d 804 (9th Cir. 1940); *Lakebo v. Carr,* 111 F. 2d 732 (9th Cir. 1940)]. As the Supreme Court in *United States v. Schwimmer, supra,* pointed out (pp. 649-650):

> "* * * But aliens can acquire such equality only by naturalization according to the uniform rules prescribed by the Congress. They have no natural right to become citizens, but only that which is by statute conferred upon them. Because of the great value of the privileges conferred by naturalization, *the statutes prescribing qualifications and governing procedure for admission are to be construed with definite purpose to favor and support the Government.* And, in order to safeguard against admission of those who are unworthy or who for any reason fail to measure up to required standards,

the law puts the burden upon every applicant to show by stisfactory evidence that he has the specified qualifications.

* * * And when, upon a fair consideration of the evidence adduced upon an application for citizenship, doubt remains in the mind of the court as to any essential matter of fact, the United States is entitled to the benefit of such doubt and the application should be denied.

* * *" (Emphasis added).

Since naturalization is not a natural right, but a privilege, appellant's contention that he was entitled to "a prior criminal trial with all its incidents" (Br. 10) would seem to be completely without merit. The distinction between *Kennedy v. Mendoza-Martinez,* 372 U. S. 144 (1963), upon which appellant relies, and the present case, is clear. Mendoza-Martinez was a citizen of the United States by birth, and Section 401-(j) of the Nationality Act of 1940, as amended, would have divested him of this citizenship; while appellant is an alien seeking the privilege of American citizenship, and Section 315 INA merely imposes a condition upon the grant of that privilege.

Moreover, Section 315 INA does not impose punishment under the standards laid down in *Kennedy v. Mendoza-Martinez, supra,* and the prior case of *Trop v. Dulles,* 356 U. S. 86 (1958); since it is a reasonable exercise of the power of Congress to establish a uniform rule of naturalization [U. S. Const., Article I, Section 8, Clause 4; *cf. Perez v. Brownell,* 356 U. S. 44 (1958); see also, *Kahook v. Johnson,* 273 F. 2d 413, 414 (5th Cir. 1960)]. The statute cannot be con-

strued to impose punishment in the constitutional sense merely because of the incidental use by courts of the word "penalty" in construing it.

III.

Appellant Had an Opportunity to Make an Intelligent Election Between Exemption and No Citizenship, and No Exemption and Citizenship.

Appellant first indicated his desire to claim exemption as a treaty alien in his letter dated September 10, 1953 [SS Ex. 1-D], and following that letter he appeared before his local board for an interview on September 22, 1953 [SS Exs. 1-C and 1-E]. At this interview appellant stated that he "cannot decide whether or not he will sign the statement requesting exemption as Treaty Alien", but that he would "advise the Board by letter in a few days" [SS Ex. 1-E]. The logical inference is that appellant at his interview on September 22, 1953 was shown the standard form for application for exemption from military service [See, SS Ex. 1-G-1] or advised of its contents; and that his indecision at that time was created by the detriment that signing would impose, namely, a permanent bar to American citizenship.

However, this case need not rest on inference, since on October 5, 1953 the Director of the Selective Service System wrote to Representative Holzman, specifically calling attention to Section 315 INA and its provisions [SS Ex. 1-M; and R. 54]; and on October 6, 1953 Representative Holzman sent a copy of this letter to appellant [R. 53]. In addition, on October 7, 1953 appellant was interviewed at the office of the State Director of Selective Service, during which in-

terview he was apprised of Section 315 INA [SS Ex. 1-G]. And again on October 9, 1953 when he filed his application for exemption, he was handed a copy of Section 315 [SS Ex. 1-C; R. 22].

Appellant's high level of intelligence is indicated not only by his educational background [R. 10], but also by his employment [R. 10-11] and the caliber of his correspondence [see, *e.g.* SS Ex. 1-D]. He could read, write, and speak English when he first arrived in the United States [R. 10-11]. Under these circumstances, the District Court was not required to accept appellant's testimony that he "did not know what the consequences might be" if he applied for exemption on other than the prescribed form,[6] even though such testimony may have been unimpeached or not directly contradicted [*Quock Ting v. United States,* 140 U. S. 417 (1891), *Factor v. C. I. R.,* 281 F. 2d 100, 111 (9th Cir. 1960), cert. den. 364 U. S. 933; *Joseph v. Donover Co.,* 261 F. 2d 812 (9th Cir. 1958), and authorities cited therein; see also, *Guzman v. Pichirilo,* 369 U. S. 698, 702-703 (1962)]. As indicated above, this testimony was indirectly contradicted [See, SS Exs. 1-G and 1-M].

This case is readily distinguishable from *Moser v. United States,* 341 U. S. 41 (1951), upon which appellant relies (Br. 11). Moser was misled, and it was undisputed that he signed the application for exemption believing that he was not thereby precluded from citizenship, and that had he known claiming exemption would debar him from citizenship, he would not have claimed it, but would have elected to serve in the armed

[6]For another case in which the prescribed from was not used, see *Petition of Burky,* 161 F. Supp. 736 (E.D. N.Y. 1958).

forces" [341 U. S. at p. 45]. Here, however, there is ample evidence to show that appellant had an opportunity to make an intelligent election between exemption and no citizenship, and no exemption and citizenship, and that he knowingly and intentionally waived his rights to citizenship [*Cf. Ungo v. Beechie,* 311 F. 2d 903 (9th Cir. 1963), cert. den. 373 U. S. 911; *Hunter v. United States,* 302 F. 2d 363 (2d Cir. 1962); *Keil v. United States,* 291 F. 2d 268 (9th Cir. 1961); *Prieto v. United States,* 289 F. 2d 12 (5th Cir. 1961); *Kahook v. Johnson,* 273 F. 2d 413 (5th Cir. 1960); *Jubran v. United States,* 255 F. 2d 81 (5th Cir. 1958); *Petition of Skender,* 248 F. 2d 92 (2d Cir. 1957), cert. den. 355 U. S. 931].

IV.

The Findings of the District Court Were Sufficient.

Appellant contends that the District Court "erred in failing to make specific findings of fact as to whether under the facts of the case appellant had the opportunity to make an intelligent election between exemption and no citizenship, and no exemption and citizenship * * *" (Br. 5), relying upon this Court's decision in *Brunner v. Del Guercio,* 259 F. 2d 583 (9th Cir. 1958) (Br. 13). However, the court below found [Finding of Fact IV; R. 62]:

> "That the petitioner was informed by his local draft board of the provisions of Section 315 of the Immigration and Nationality Act (8 U. S. C. 1426) which provided that he would be ineligible

for naturalization if such exemption was granted to him for that reason."

Appellee submits that this finding is sufficient, although it is not in the precise language suggested in the *Brunner* decision (p. 586, footnote 3). This would seem to be particularly true in view of the rule, discussed in Part II, *supra,* that the burden rests upon an applicant to establish that he has met the statutory qualifications to entitle him to the privilege of naturalization. However, if this Court should determine otherwise, appellee submits that the case should be remanded so that the District Court may have an opportunity to make further findings; since there is ample evidence from which any findings necessary to support the denial of appellant's petition for naturalization could be made.

Appellant also complains that the District Court failed to make any specific finding as to whether appellant was a conscientious objector (Br. 5, 13). Such a finding was neither necessary nor proper. The only issue before the District Court was appellant's eligibility for naturalization under Section 315 INA; and a finding as to whether appellant was a conscientious objector would be neither relevant nor material. Moreover, appellant's classification under the Selective Service laws was confided to the executive branch (See, *The Universal Military Training and Service Act of 1951,* 65 Stat. 75, 50 U. S. C. App. (1952 Ed.) 451, *et seq.*; see also, 32 C. F. R. Parts 1622 and 1623).

V.

Appellant Was Entitled to Exemption From Military Service as a Treaty Alien, But Even If He Was Not, Section 315 INA Is Nevertheless Applicable.

By Executive Order No. 10292 of September 25, 1951, quoted under Treaties, Statutes and Regulations, *supra,* the President of the United States expressly provided for the exemption of treaty aliens; and appellee submits that the President had power to make this exemption [*Ungo v. Beechie* (9th Cir. 1963), cert. den. 373 U. S. 911; *Schenkel v. Landon,* 133 F. Supp. 305 (D. C. Mass. 1955)].

The case of *Petition of Rego,* 289 F. 2d 174 (3rd Cir. 1961), upon which appellant relies (Br. 14) is not persuasive; since the court reached its conclusion by construing Section 4(a) of the 1948 Selective Service Act, as amended. The court, however, impliedly recognized that a treaty alien who was a permanent resident would be barred under Section 315 INA, since it applied an entirely different reason for not enforcing that section.

Moreover, even if the executive order exempting treaty aliens was invalid, Section 315 should nevertheless be applied (*Ungo v. Beechie, supra; Petition of Carvajal,* 154 F. Supp. 525 (N.D. Calif. 1957); *United States ex rel. Rosio v. Shaughnessy,* 134 F. Supp. 217 (S.D. N.Y. 1954); *cf. Petition of Skender,* 248 F. 2d 92 (2d Cir. 1957), cert. den. 355 U. S. 931). As the Court in *Petition of Skender, supra,* pointed out (pp. 95-96):

> "* * * There is nothing in the language of that section to suggest that only those legally entitled

to be relieved shall be debarred: it is the fact of relief, not the legal right to it, that is determinative of the second prong of the condition. * * *

After all, if debarment from citizenship is deemed a just fate for an alien who sought and was accorded an exemption to which he was entitled, it is not unduly harsh for one who (a) sought an exemption to which he was entitled and (b) was accorded an exemption to which he was not entitled. Section 315(a) did not leave it open to the appellant to attack the validity of the very classification which he sought on the ground that when made it gave him an exemption to which he was not entitled. * * *

* * *"

VI.

Conclusion.

Wherefore, for the reasons set forth above, it is respectfully submitted that the judgment of the district Court denying appellant's petition for naturalization should be affirmed.

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Assistant United States Attorney,
Attorneys for Appellee.

No. 18,681

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HEINRICH FRITZ BACHMANN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLANT'S REPLY BRIEF.

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TABLE OF AUTHORITIES CITED

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APPELLANT'S REPLY BRIEF.

Introduction.

The appellant has set forth his contentions in his opening brief. However, to clarify his position, and in answer to the brief by appellee, he adds the following in support of his appeal to become a United States citizen.

ARGUMENT.

I.

Heinrich Fritz Bachmann Was Never Relieved From Military Service as a Treaty Alien.

Appellee contends that a finding as to whether appellant Bachmann was a conscientious objector would be neither relevant nor material (Gov. Br. 17). We feel this finding is both relevant and material, because

if appellant was a conscientious objector, and if the appeal board decided to classify him V-A because he was a conscientious objector, then obviously he was not relieved from military service as a treaty alien, and Section 315 of the Immigration and Nationality Act does not apply.

As indicated in our opening brief on page 7, the appeal board, when faced with a request for I-O classification shall first determine whether the registrant is eligible for classification in a class lower than class I-O, which here obviously was the case. V-A classification does not mean that a person is unconditionally not subject to military service, but that he will not be called unless certain circumstances exist. This Court may well take judicial notice of the fact that persons with a V-A classification were called during World War II to render service in the Armed Forces of the United States.

If classification in Class V-A is automatic as the government contends (Gov. Br. 10), then why was this reclassification not taken care of by the local draft board, which on November 24, 1953 determined that "information does not warrant reopening, forward on appeal" [Govt. Ex. C, 1-C], since he had then been twenty-six years of age since November 4, 1953? There was no change of circumstances between November 24, 1953 and December 29, 1953, when the appeal board reclassified him V-A.

The sketchy Selective Service notations [Govt. Ex. C, 1-C] are not very helpful in determining the facts on which decisions were based.

II.

Section 315 INA Is a Penalty Clause and as Such Required the Safeguards of the Fifth and Sixth Amendments to the United States Constitution, and It Was a Denial of Due Process to Impose on Bachmann the Burden of Proof to Show That He Did Not Violate Said Clause.

That the denial of citizenship is a penalty is reinforced by the case of *Petition for Naturalization of Koplin* (1962), 204 F. Supp. 33 where the Court on page 36 states in referring to Section 315(a) of the Immigration and Naturalization Act, Title 8 U. S. C. A. §1426(a):

> "Surprisingly, the courts have construed this provision so as to require that the waiver be made with intelligence and knowledge. Moser v. United States, 341 U.S. 41, 71 S.Ct. 553, 95 L.Ed. 729; In re Planas, D.C., 152 F. Supp. 456 (1957). *The apparent reason for departing from the general rule that one is presumed to know the law and that singing of a document such as this concludes the matter, is the fact that such waiver forms are usually executed by aliens who have little understanding of our customs, mores, law and language, and who are thus apt to lack a realization that by a stroke of the pen they are forever renouncing a most precious status.* Machado v. McGrath, 89 U.S. App.D.C. 70, 193 F.2d 706." (Emphasis ours.)

Here we have a clear statement by the Court that there is a departure from the general rule of the presumption of knowing the law under circumstances applicable to the case at bar. The Court implies that the

burden of proof is on the government to show that the alien understood what he was doing. In our case there is a complete failure of proof in that respect.

The Court continues in the *Koplin* case, *supra,* on the same page:

> "In Moser v. United States, supra, the Supreme Court of the United States first established a standard for gauging whether the waiver was an intelligent one. In that case, the Supreme Court, speaking through Mr. Justice Minton, said: '. . . Considering all the circumstances of the case, we think that to bar petitioner, nothing less than an intelligent waiver is required by elementary fairness. Johnson v. United States, 318 U.S. 189, 197 [63 S.Ct. 549, 553, 87 L.Ed. 704]. To hold otherwise would be to entrap petitioner.' *In citing Johnson v. United States, Judge Minton was comparing this waiver to the waiver of the privilege against self-incrimination and this analogy has been followed in subsequent cases.*" (Emphasis ours.)

This is additional evidence that Section 315 INA is considered a penalty clause, since the United States Supreme Court applies the standards applicable to criminal cases.

In the *Koplin* case the Court continues:

> "In Ballester Pons v. United States, 220 F.2d 399 (1 Cir., 1955), the Court recognized the standard of 'intelligent waiver' and evaluated the Moser decision in these words: ' * * * But the Supreme Court read into § 3(a) the implication that the bar to naturalization would not operate until

the alien had made an intelligent choice between the alternatives presented, *well knowing the legal effect of what he did* * * *'

In Brunner v. Del Guercio, 259 F.2d 583 (9 Cir., 1958), there was a reversal because of the failure of the Board of Immigration Appeals to 'find that Brunner knowingly and intentionally waived his rights to citizenship when he executed the Selective Service form.' " (Emphasis ours.)

In the instant case we have evidence that he was informed of the existence of the law, that he was handed a copy of the law, but nowhere is there a scintilla of evidence that he understood what the law meant, or that he was aware of the consequences of his letter of October 9, 1953 to his draft board requesting exemption as a treaty alien.

The *Koplin* case continues on pages 36 and 37:

"Machado v. McGrath, 193 F.2d 706 (D.C.Cir., 1951), also recognized the significance of the Moser decision, and added this comment:

' * * * The sound reason for affording such an opportunity arises in good part from our conviction that American citizenship being a most precious right, its denial should not be allowed to rest upon a doubtful premise. Upon similar reasoning, it should not be allowed in this case to rest upon the narrower view of the allegations of the complaint. We hold that appellant is entitled to a responsive pleading on the issue of mistake.' "

This statement holds that the Selective Service records should not be conclusive on the issue of mistake.

It is interesting to compare Sections 314 and 315 INA in regard to the ineligibility to become a citizen of the United States. We find that in the case of deserters and draft dodgers there must be conviction by court martial or by a court of competent jurisdiction. In the case of aliens who apply for and are relieved from training and service on the ground of alienage, the records of the Selective Service System or of the national military establishment are to be conclusive as to whether the alien was relieved from such training and service on the ground of alienage.

Conviction for draft evasion is not a prerequisite to the operation of this sanction in the case of an alien relieved from service because of alienage. Independently of prosecution, forfeiture of rights to citizenship attaches when the statutory set of facts develop, without any administrative or judicial proceedings.

To alien deserters and draft dodgers the safeguards of the Fifth and Sixth Amendments of the United States Constitution are granted. As to an alien who attempts to be relieved on the ground of alienage we see that only the Selective Service records are sufficient, and it is submitted that this is unconstitutional since there is no rational reason for depriving these aliens of the safeguards of due process.

In the case of *Kennedy v. Mendoza-Martinez* (1963), 372 U. S. 144, 83 S. Ct. 554, we find a detailed

analysis of the Congressional intent. We find that Congress intended all the legislation which deprives citizens of citizenship or bars non-citizens from becoming citizens, to be penal in nature. Having concluded that a penalty has been intended, then there is no question but that the safeguards of due process must be observed.

We submit that Congress may subscribe or impose conditions for admission to citizenship but not even Congress may deprive a permanent resident alien of the privilege of citizenship without allowing him a fair opportunity to be heard. Naturalization is a judicial proceeding. A hearing is given to the alien. Section 315 INA takes away the right of the alien to a hearing since the Selective Service records are conclusive evidence of exemption from military service.

These records are not based on an administrative hearing which would allow an alien an opportunity to expose his opinion or express his views. The Selective Service appeal board makes its determination from the record of the draft board. Again, we do not have in fact an administrative hearing. Therefore, not only are the safeguards of the Fifth and Sixth Amendments to the United States Constitution withheld from such an alien, but the protection of due process as well, inasmuch as no hearing is given to him in the administrative stage of the proceedings.

III.

Appellant Had No Opportunity to Make an Intelligent Election Between Exemption and No Citizenship, and No Exemption and Citizenship, and Furthermore, as a Conscientious Objector, He Was Entitled to Be Exempt From Military Service Because of His Religious Beliefs.

The government contends that there is evidence to show intelligent choice on the part of appellant. (Gov. Br. 14-15.) As evidence it says that there had been an interview on September 22, 1953, and that at that time appellant stated that he could not decide whether he would sign the statement requesting exemption as a treaty alien. However, looking at this purported evidence, there is no reference either in the cover sheet [Govt. Ex. C, 1-C] or in the unsigned memorandum [Govt. Ex. C, 1-E] that Section 315 INA was shown to, or that it was even discussed with the appellant, nor is there a reference to whether the appellant understood the consequences which would result if he signed a statement requesting exemption.

The government supports its contention, which it considers more than an inference, by the letter from the Director of the Selective Service System, Mr. Hershey. (Gov. Br. 14.) However, Mr. Hershey states in the letter that the action on the part of the appellant "might" bar him from citizenship.

The government's next piece of "evidence" (Gov. Br. 14) is the letter of the New York City Director of Selective Service, Candler Cobb [Govt. Ex. C, 1-G], relating an interview between Colonel Akst of his office and the appellant. The government contends that the

appellant was apprised by Colonel Akst of Section 315 INA during this interview. If we read the letter we see that this statement is incorrect. We find in it the following statement:

> "He was thereupon advised that he could make up his own statement and he would be eligible for IV-C classification, but that he would be either given or mailed Section 315 of the McCarren Act."

Nowhere in the letter do we find that he was apprised of the contents of Section 315 of the McCarren Act or that he understood the consequences of said Act.

The government contends that on October 9, 1953 appellant went and filed his letter requesting exemption as a treaty alien, and that he was at that time handed a copy of Section 315 INA. (Gov. Br. 15.) On this point we agree with the government. The notation for October 9, 1953 of Government's Exhibit C, 1-C states, "Section 315 of the I & N Act handed to registrant". Where in this notation is there an indication that registrant read the Section 315, that he understood the meaning of it, or that he was fully apprised of the consequences? The complete record of the Selective Service System [Govt. Ex. C] up to this date is completely silent on this point.

The purported evidence given by the government in its brief is only a series of inferences based on inferences drawn from the sketchy notations and files of the Selective Service System.

IV.

The Findings of the District Court Were Not Sufficient.

Even the government apparently concedes (Gov. Br. 17) that the case of *Brunner v. Del Guercio,* 259 F. 2d 583 (9th Cir. 1958) was not followed by the District Court in its findings of fact as to whether under the facts of the case appellant had the opportunity to make an intelligent election between exemption and no citizenship, and no exemption and citizenship. On the issue of opportunity for intelligent waiver the Finding of Fact only says [R. 62]:

> "IV That the petitioner was informed by his local draft board of the provisions of Section 315 of the Immigration and Nationality Act (8 U.S.C. 1426) which provided that he would be ineligible for naturalization if such exemption was granted to him for that reason."

There is nowhere in this finding an allegation that he understood the information and the full impact thereof. "Informing", consisting merely of handing him a copy of the section, without more, is obviously inadequate. The District Court's conclusion of law is therefore not supported by the evidence, or by the finding of fact.

It is submitted that this case should not be remanded to the District Court for making further findings, but that this Court, in considering the overwhelming weight of the evidence, should find that appellant had no opportunity to make an intelligent choice, and therefore is not barred from citizenship, and therefore that the District Court should be directed to admit appellant to United States citizenship.

V.

Permanent Resident Aliens Are Treated Like Citizens in That They Have the Same Unqualified Obligation to Render Military Service as Do Citizens.

While the government quotes Executive Order No. 10292 of September 25, 1951 (Gov. Br. 18), and states that the President may exempt treaty aliens, the government does not quote the Executive Order of February 17, 1956, No. 10659, 21 F. R. 1103 as to permanent resident aliens, made by the President at that time by virtue of the enabling statutes.

In 32 C. F. R. 326 in section 1622.42(b) we find the following statements:

> "In Class IV-C shall be placed any registrant who is an alien and who has not been admitted to the United States for permanent residence but who has remained in the United States for a period exceeding one year and who has, prior to his induction, made application to be relieved from liability for training and service in the Armed Forces of the United States by filing with the local board an Application by Alien for Relief from Training and Service in the Armed Forces (SSS Form No. 130), executed in duplicate. The local board shall forward the original of such form to the Director of Selective Service through the State Director of Selective Service and shall retain the duplicate in the registrant's Cover Sheet (SSS Form No. 101)."

Said order was made by the President by virtue of the enabling statutes of the 1948 Act, as amended on June 19, 1951, 50 U. S. C. A. Appendix, Sec. 454(a).

It was not the Congressional intent in enacting Section 315 of the INA to bar from citizenship those aliens who are erroneously exempted from military service through the misunderstanding of the law by the Selective Service System, or that errors by the Selective Service System should penalize the alien. The laws in this country are made for the protection of the people and not to entrap the innocent, who should not suffer a penalty as a result of the lack of knowledge and understanding of the law by an agency of our government.

Conclusion.

For the reasons stated, it is submitted that the appellant Bachmann is entitled to be admitted to United States citizenship.

Dated, Los Angeles, California, December 27, 1963.

Respectfully submitted,

MILAN MOACANIN,
Attorney for Appellant.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the 9th Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

MILAN MOACANIN

No. 18684

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SOUTHERN ARIZONA YORK REFRIGERATION COMPANY, *et al.*,

Appellants,

vs.

YORK MANUFACTURING CO., *et al.*,

Appellee.

Appeal From the District Court of the United States Southern District of California, Central Division.

OPENING BRIEF FOR APPELLANTS.

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

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Appellee.

On Appeal From the District Court of the United States Southern District of California, Central Division.

OPENING BRIEF FOR APPELLANTS.

I.

Statement of Jurisdiction.

The federal jurisdiction of this Court is invoked upon the ground of diversity of citizenship under Title 28 U. S. C. Section 1332 in that plaintiffs are corporations organized under the laws of the State of Arizona and have their principal place of business in said State, and that the defendant is a corporation organized under the laws of the State of Connecticut with its principal place of business in said State, and it also has a plant and business office in the County of Riverside, State of California, and is doing business within the territory and area embraced by the Federal District Court of Southern California, Central Division; that plaintiffs have alleged their damages to be in excess of $10,000.00 exclusive of costs and interests.

II.

Statement of the Case.

The present case is not entirely new to this Court. This Court has heard some of the prior history of the present case and its previous decisions anent certain portions of the case are to be found in: *Authorized Supply Company of Arizona, a corporation, appellant, v. Swift & Company, a corporation, et al., appellees,* and *Arizona York Refrigeration Company, a corporation, et al, appellant, v. Swift & Company, a corporation, appellee,* 271 F. 2d 242 (1960), Ninth Circuit, rehearing 277 F. 2d 710 (1960) Ninth Circuit.

All relevant facts of the case may be found in the Stipulation of Facts of the pretrial order, and Findings of Fact in the District Court. On or about May 31, 1955, plaintiffs made a written contract with Swift & Company, an Illinois corporation in the City of Tucson, State of Arizona. Plaintiffs' contract with the aforesaid Swift & Company was to install refrigeration equipment in Swift & Company's building in said city.

The terms of the written contract, among other things, required the furnishing and installation of two refrigeration coils. In order to perform the contract of installation, two Model EDA 240 electric ammonia refrigeration coils, which had been manufactured and designed by the defendant, were purchased from the Authorized Supply Company of Arizona, an Arizona corporation.

Under the terms of the written contract, made between plaintiffs and Swift & Company, the coils were installed by plaintiffs in Swift & Company's building.

Installation was completed about September 5, 1955, and at that time, the system was tested and worked satisfactorily for a period of time thereafter of approximately one to two months.

Prior to the startup and operation of the refrigeration system, said coils were tested by the plaintiffs and were found to be satisfactory and without any leaks whatsoever. Approximately one to two months after the installation of said equipment, a leak developed in the south coil which caused no damage to any of the refrigerated products. The West-Coast representative of the defendant, one Oliver Butler, instructed plaintiffs' maintenance engineer how to repair the leak. Said leak was repaired upon instruction from the aforesaid Butler by removing the heater element (electrode) from its innertube where the leak was discovered and welding closed said innertube at the end.

A short time later, two more leaks developed, one in the north refrigeration coil and one in the south refrigeration coil. Each of these leaks was repaired under the instruction of defendant by removing the heater element and welding closed the innertube in which the heater element was placed. The cost of the repairs to the three leaks were paid for by plaintiffs, but they were reimbursed by the defendant.

On the weekend of December 3 and 4, 1955, another leak developed in one of the coils, permitting ammonia gas to escape into Swift & Company's storage area and as a proximate result thereof, meat and other products were damaged in the sum of $9,175.29. On or about December 27 or 28, 1955, defendant through its distributor in Arizona, the Authorized Supply Company, at no cost to plaintiffs, replaced the defective coils

with new Bush coils of an improved design. The said new coils, installed by plaintiffs in said plant, performed satisfactorily.

Thereafter, on October 19, 1956, Swift & Company filed a law suit in the United States District Court of the District of Arizona, naming as parties defendant in said law suit, plaintiffs, the Authorized Supply Company, an Arizona corporation, and defendant.

At the time of the filing of the law suit, and at the time that plaintiffs were served as party defendants in that action, plaintiffs called upon defendant herein to take over the defense of the law suit and to pay any damages sustained by Swift & Company as a proximate result of the coil leaks, and at that time and at all times subsequent thereto, defendant refused and has refused to do so.

On February 18, 1957, plaintiffs filed a third party law suit, naming as defendants, the defendant herein and the Authorized Supply Company. Said suit was filed in the United States District Court of Arizona. Thereafter, said Court found that it had no jurisdiction over defendant herein by reason of the fact that it (defendant herein) was not doing business in Arizona. That law suit was dismissed by the Court as to third party defendant and defendant herein on the above mentioned basis.

Subsequently, plaintiffs herein were found liable to Swift & Company for the damage to its meat on the basis of the breach of an expressed warranty to furnish merchantable goods.

The Authorized Supply Company was found not liable to plaintiffs on the ground that plaintiffs had

elected to rescind its contract for the sale of goods under the Arizona sales act with the aforesaid Authorized Supply Company, and having thus elected, under an Arizona interpretation of the sales act, had chosen an exclusive remedy for damage in the purchase of goods limiting liability to the replacement of the goods sold as against the Authorized Supply Company.

On July 29, 1960, plaintiffs paid in full said judgment of $9,175.29. Plaintiffs also paid in the defense of said law suit and the appeals thereof, attorneys fees and costs in the amount of $5,060.12.

Plaintiffs filed the present suit in Federal District Court, Southern California, Central Division, against defendant on July 1, 1961. Shortly thereafter, defendant made a motion for Summary Judgment on the grounds (1) that the Statute of Limitations had run; and (2) that plaintiffs had not stated a cause of action in equitable indemnity. Said judgment was denied on both grounds by the Honorable Fred Kunzel, District Judge, to whom the case at that time had been assigned for trial. The case thereafter was transferred for trial to the Honorable Albert Lee Stephens, Jr., before whom it was pretried and at which time plaintiffs waived their right to a jury trial. At a later date, the case was transferred to the Honorable Jesse W. Curtis for trial.

The case was tried on February 12, 1961, and evidence was offered by plaintiffs in the form of testimony by one Leland Gideon, service manager for Arizona York, who stated that, in his opinion, the leak in the coils furnished by defendant was caused by air getting between the electrode (heater element) and the innertube in which it was housed, condensing into mois-

ture during the refrigeration process, later freezing and expanding, and over a period of time cracking the innertube to cause a leak by reason of said expansion. He also testified that the coil with which the old coils were replaced, was changed in that "where the electrode goes in, it has a nut around the electrode that tightens and seals the electrode in that tube from the atmosphere in the room." [Tr. p. 29, lines 8-11; p. 44, line 10, to p. 45, line 18.]

Morris Gerhard, refrigeration welder, gave his opinion that "the leak was caused by expansion and contraction of the innertube at its connection with the suction header, causing it to leak." [Tr. p. 65, lines 17-20.]

The West Coast representative of defendant corporation at the time of the occurrence, one Oliver Butler, testified under Rule 43(b) of the Federal Rules of Civil Procedure, that "the leak could have been caused by condensation of moisture which froze and expanded in the innertube, or by the cold juncture on the heater element having been placed inside the innertube." [Tr. p. 122, lines 24-29.]

Mr. Allan Decker, Vice-President in charge of engineering of defendant, testifying under Rule 43(b) of the Federal Rules of Civil Procedure, very reluctantly admitted that "an unsealed innertube with a heater element could allow moisture to condense and upon freezing expand and cause a crack in the innertube." He also testified that "arcing at the cold juncture in the heater element having been placed inside the innertube, could have caused trouble," [Tr. pp. 95, 96] but he could give no explanation as to how the leak in the coil installed by plaintiffs occurred. [Tr. pp. 90-119.]

Dr. Morelli testified that "there could be a crack or a slit in a well (innertube) due to the differential in the coefficient of expansion of the inner and outer tube over a period of time." [Tr. p. 143, lines 12-18.]

Defendant's Exhibit B (a Dunham & Bush catalog, 1959 they could furnish no 1955 catalog), on page 32 showing a picture of an improved ED electric defrost coil, which counsel for defendant stated [Tr. p. 15, line 19] was already in evidence, a statement which counsel for plaintiffs accepted, reads "Close up view of mechanical sealing of heater element", and also "Mechanical sealing of heating elements provide positive protection against entry of any moisture into the innertube system".

At the conclusion of plaintiffs' case, the Court granted a dismissal with prejudice under Rule 41(b) of the Federal Rules of Civil Procedure on the basis that plaintiffs had not established a prima facie case of negligence against defendant.

III.

Specification of Error.

The District Court erred in granting the dismissal with prejudice at the conclusion of plaintiffs' evidence (1) on the basis of the fact that defendant, as a matter of law, was estopped to deny that the refrigeration coils, furnished by defendant, were defective when furnished; (2) under the doctrine of *res ipsa loquitur,* an inference of negligence was raised against defendant for having furnished the defective refrigeration coils, and (3) said inference was not overcome by defendant who offered no evidence by way of explanation of the

defective coils, and (4) even without collateral estoppel under the doctrine of equitable indemnification, the factual situation presented by plaintiffs, was such that the doctrine of *res ipsa loquitur* placed the burden on defendant of at least offering evidence to overcome the inference of negligence raised by the stipulated facts and plaintiffs' evidence.

IV.

Summary of Argument.

1. Collateral estopepl and *Res Judicata* estop defendant from denying it furnished defective coils.

2. *Res Ipsa Loquitur* is a doctrine of evidence and not of substantive law.

3. Requisite fact situation for application of doctrine of *Res Ipsa Loquitur* embraces three conditions.

4. Second condition met if instrumentality under control of defendant at time of alleged negligent act.

5. Present factual situation is the kind in which doctrine of *Res Ipsa Loquitur* should apply.

6. Plaintiff not deprived of doctrine by the introduction of evidence tending to show specific acts of negligence on the part of defendant.

7. In considering a motion for a non suit, all evidence must be considered true and all inferences and doubtful questions must be construed favorable to plaintiff.

8. Plaintiff established prima facie case under doctrine of *Res Ipsa Loquitur* and judgment should be reversed.

V.

Argument.

1. **The Doctrine of Collateral Estoppel and Res Judicata Estop Defendant From Denying It Furnished Defective Coils.**

Where the indemnitor is notified of pendency of an action against the indemnitee in reference to the subject matter of the indemnity and is given an opportunity to defend such action, and the judgment in such action is obtained without fraud, it is conclusive on the indemnitor as to all questions determined therein which are material to a recovery against him in an action for indemnity brought by the indemnitee, *Lamb v. Belt Casualty Company,* 3 Cal. App. 624, 40 P. 2d 311; *Bachman v. Independence Indemnity Company,* 112 Cal. App. 465, 297 Pac. 110 citing Corpus Juris; *Santa Cruz Portland Cement Company v. Snow Mountain Water and Power Company,* 96 Cal. App. 615, 274 Pac. 617; 42 Corpus Juris Secundum, Negligence, Section 32, page 614.

As is stated in *West Jersey and SSR Company v. Atlantic City Electric Company,* 107 New Jersey Equity 457, 153 Atl. 254; 42 C. J. S., page 614. Prior judgment against the indemnitee is conclusive against indemnitor whether suit for indemnity is in equity or at law.

Thus, in the case of *Swift & Company v. Arizona York, et al.,* 271 F. 2d 242 (1960) defendant refused to take over the defense of plaintiffs after having been requested to do so and the Court found as a fact that the proximate cause of the damages to Swift & Company were the defective coils furnished by defendant.

2. Res Ipsa Loquitur Is a Doctrine of Evidence and Not of Substantive Law.

The doctrine of *Res Ipsa Loquitur* is one of evidence and not of substantive law. It consequently should be governed by the law of the forum. *Dorswitt v. Wilson* (1942), 51 Cal. App. 2d 623, 125 P. 2d 626; *Pacific Tel. & Tel. Company v. Lodi,* 58 Cal. App. 2d 888, 137 P. 2d 847, 65 Corpus Juris Secundum, Section 220(3), page 993.

However, there is no problem of conflict of law raised here in that the factual situation in the present case presents a proper case for the application of the doctrine of *Res Ipsa Loquitur* in both Connecticut, the state where the refrigeration coils were manufactured and designed, and California, the state of the forum. *Jump v. Ensign-Bickford Company,* 117 Conn. 110, 167 Atl. 90 (1933).

3. The Requisite Fact Situation for Application of Doctrine of Res Ipsa Loquitur Embraces Three Conditions.

In the early 19th century, the case of *Scott v. London Docks Company,* 3 H & C 596, 601 reprint 665; 65 Corpus Juris Secundum Section 220 (3) at page 993, three conditions that have been quoted wherever the doctrine of *Res Ipsa Loquitur* has been applied, were originally cited. These were

> "(1) the accident must be of the kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff".

These conditions are cited in both California and Connecticut. *Ybarra v. Stangard,* 25 Cal. 2d 486 at p. 489, 154 P. 2d 687 at 689, 162 A. L. R. 1258, *Schiesel v. Poli Realty Company,* 108 Conn. 115 at 121, 142 Atl. 812 at 814.

From the evidence and stipulations in the present case, it would seem that the evidence is sufficient to meet the requirements of conditions 1 and 3. Any questions which might be raised would have to do with the requirement of condition 2, the exclusive control of defendant over the instrumentality causing the accident.

4. Second Condition Met if Instrumentality Under Control of Defendant at Time of Alleged Negligent Act.

In 65 Corpus Juris Secundum at page 1011, Negligence, Section 220 (8) it is stated that

> "According to some authorities in order to invoke the doctrine (Res Ipsa Loquitur), it must appear that the injuring agency was under the control or management of the defendant at the time of the accident, however, it has been held that there is nothing in the reason for the rule or the principles on which it is founded to support the contention that its application is so limited. The defendant's control need not have obtained for any length of time and under some circumstances, it is sufficient if it appears that the injuring agency was in the control of the defendant at the time of the negligent act which caused the injury, although not in his control at the time of the accident provided plaintiff first proves that the condition of the instrumentality had not changed after it left defendant's possession".

This application of the doctrine has been followed widely and is the law in both California, *Dimare v. Cresci,* 23 Cal. Rptr. 772, 373 F. 2d 860, and Connecticut, *Jump v. Ensign-Bickford Company,* 117 Conn. 110, 167 Atl. 90. In the latter case, certain explosives were manufactured in Connecticut, shipped to Tennessee and during the course of operations there, the explosives went off prematurely injuring a person. The Court found that the doctrine of *Res Ipsa Loquitur* applied by reason of the fact that if there had been any negligence, it must have been during the course of manufacturing of the explosives. If it had been manufactured properly, it could not have gone off prematurely.

5. Present Factual Situation Is the Kind in Which Doctrine of Res Ipsa Loquitur Should Apply.

It would seem that if, at the time the negligence occurred, the instrumentality was in the exclusive control of the defendant, the second condition historically voiced in *Scott v. London Docks Company,* and reiterated in the cases quoted above, would be met, for, as is stated in *Jump v. Ensign-Bickford*

> "It is true that at the time of the accident, the fuse was in the possession and control of the plaintiff, and the second condition we have stated is not literally fulfilled but the purpose of that condition is to exclude the possibility of an intervening act of plaintiff or a third party which causes or contributes to produce the accident and it undoubtedly states the necessary precautions for a sound application of the rule in most cases. In the case at bar, however, . . . evidence that nothing physically could be done to the fuse after it left the defendant's factory to cause it to burn as rapidly as it did, would serve to obviate, in this case, the need for that precaution".

Thus, in the present case, the fact that the coils were installed and operated for a month in a proper fashion and that the defect, when discovered, was inside the coil and had not been touched and not been "acted upon by any outside force since the time of the manufacture." would seem to obviate the need for the precaution of the second condition of *Res Ipsa Loquitur* quoted above.

The doctrine of *Res Ipsa Loquitur* is a rule of evidence peculiar to the law of negligence which recognizes that *prima facie* negligence may be established without direct proof and furnishes a substitute for specific proof of negligence. The doctrine is in part predicated on and requires that the defendant have superior knowledge or means of knowing the cause of the accident. *Doke v. Pacific Crane & Rigging Company,* 80 Cal. App. 2d 601, 182 P. 2d 284; *Kenney v. Antoinette,* 211 Cal. 336, 295 Pac. 341; *Armstrong v. Pacific Greyhound Line,* 168 P. 2d 457, 74 Cal. App. 2d 367; *Finn v. American Bus Line,* 456 Ariz. 567, 110 P. 2d 227.

> "The doctrine of Res Ipsa Loquitur is applicable where the accident is of such a nature that it can be said, in the light of past experience, that it probably was the result of negligence by someone and that the defendant is probably the one responsible".
>
> *Dimare v. Soberanes,* 56 Cal. 2d 466, 14 Cal. Rptr. 545, 363 P. 2d 593;
>
> *Guerra v. Handlery Hotels, Inc.,* 53 Cal. 2d 266, 271, 1 Cal. Rptr. 330, 347 P. 2d 674;
>
> *Zentz v. Coca Cola Bottling Company,* 39 Cal. 2d 436 at 446, 247 P. 2d 344.

"On the basis of the existence of such probabilities, the doctrine has been applied where the defendant was responsible for construction, maintenance or inspection of the defective premises which caused the injury"

Dimare v. Cresci, 23 Cal. Rptr. 772 at 776, 373 P. 2d 860.

In the case at hand, the defendant was certainly in a superior position to determine the cause of the leaks in the refrigerator coil. It was in complete control at the time of the design and manufacture of the coils.

6. Plaintiff Is Not Deprived of the Doctrine of Res Ipsa Loquitur by the Introduction of Evidence Tending to Show Specific Acts of Negligence on the Part of Defendant.

It is stated

"The introduction of evidence of specific acts of negligence does not deprive the plaintiff of the benefit of the doctrine unless the facts as to the cause of the accident and the care exercised by defendant are shown as a matter of law, thus eliminating any justification for resort to the inference of negligence." *Borkenkraut v. Witten,* 56 Cal. 2d 538, 548, 15 Cal. Rptr. 630, 364 P. 2d 467; *Leet v. Union Pacific Railroad Company,* 25 Cal. 2d 605, 620-622, 155 P. 2d 42, 158 A. L. R. 1008: See Prosser on Torts, Second Edition 1955, page 214.

As is stated in 65 Corpus Juris Secundum, Negligence, Section 220(6) at page 1004

"Plaintiff is not deprived of the benefit of the doctrine from the mere introduction of evidence

> which does not clearly establish the fact or leaves the matter doubtful, for if the case is a proper one for the application of the doctrine and if under the rules discussed, it should be invoked, an unsuccessful attempt on the part of the plaintiff to show a specific negligent act which caused the damage, does not weaken or displace the inference of negligence on the part of the defendant arising from the facts of the case by virtue of the rules of Res Ipsa Loquitur." *Strock v. Pickwick Stages System,* 107 Cal. App. 298, 290 Pac. 482 and cases cited previously.

In the present case, the plaintiffs have shown that the instrumentality which was the direct and proximate cause of the damages sustained by plaintiffs, was designed and manufactured by defendant, was furnished by defendant, was installed by plaintiffs, operated for one month. When defects arose approximately one month after operation, they were in a portion of the manufactured coil (the refrigeration coil) which had not come in contact with any outside force. It operated properly for a month and then became defective.

The instrumentality was exclusively under the control of defendant at the time any alleged negligence in design and manufacture of the aforesaid instrumentality occurred.

As a consequence thereof, it would seem that the doctrine of *Res Ipsa Loquitur* applied in this factual situation according to the cases cited above, raises an inference of negligence on the defendant which would require proof or explanation as to what caused the leak in the instrumentality after it had been installed in Swift & Company's plant.

The fact that plaintiffs tried to show specific acts of negligence in the design, in no way excused the defendant from making a proper explanation as to the exact cause of the leak in the instrumentality.

Defendant most assuredly did not explain why or how it occurred, for as is stated in the case of *Jump v. Ensign-Bickford Company,* cited previously:

> "Experience has demonstrated that when certain facts are proven ordinarily a certain inference follows and that in the absence of their explanation or rebuttal, reliance may be placed upon the probative strength of the inference to permit a presumption of law attaching to it, certain legal consequences will arise. The presumption is neither the fact nor the inference, but as Thayer says 'The legal consequences of it.' "

7. In Considering a Motion for a Nonsuit, All Evidence Must Be Considered True and All Inferences and Doubtful Questions Must Be Construed Favorable to Plaintiff.

The law of the State of California, the state of the forum, states "Where a judgment is rendered upon a motion for a non suit (the equivalent of a dismissal under Section 41(b) of the Federal Rules of Civil Procedure), the Court must assume that all evidence received in favor of the plaintiff relevant to the issues, is true and all inferences and doubtful questions must be construed most favorable to plaintiff" *Hinds v. Wheadon,* 19 Cal. 2d 458 at 460, 121 Pac. 724 at 725.

VI.

Conclusion.

It is respectfully submitted that applying the law to this case under the doctrine of *Res Ipsa Loquitur,* the plaintiffs established a *prima facie* case of negligence as against defendant and the judgment should be reversed.

Respectfully submitted,

JOHN W. MORAN,
Attorney for Appellants.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN W. MORAN

Sept. 10, 1963.

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Appellants,

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BRIEF OF APPELLEE.

I.

STATEMENT OF JURISDICTION.

The federal jurisdiction of the District Court was invoked upon the ground of diversity of citizenship under Title 28 U. S. C., section 1332, in that Appellants are corporations organized under the laws of the State of Arizona and the Appellee is a corporation organized under the laws of the State of Connecticut with a place of business in the State of California within the territory embraced by the Federal District Court of Southern California, Central Division, and Appellants have alleged their damages to be in excess of $10,000.00 exclusive of costs and interest, but which includes attorneys' fees paid in defending a prior action.

II.
STATEMENT OF THE CASE.

A. The Action.

This is an action for indemnification for money paid by the Appellants to Swift and Company in Tucson, Arizona, under an express warranty by and between Appellants and Swift and Company. Appellants in turn filed the instant action against Appellee for indemnification alleging negligent manufacture and/or design of certain refrigeration coils.

B. The Facts.

Most of the essential facts are stated in the Pre-Trial Order and only will be summarized here.

On or about May 31, 1955, Appellants entered into a written contract with Swift and Company in the City of Tucson, Arizona, to install refrigeration equipment in Swift and Company's building located in that city. These coils were purchased by Appellants from the Authorized Supply Company of Arizona which was a distributor for Appellee in that state. Two refrigeration coils were installed by the Appellants in Swift and Company's building on or about September 5, 1955. The refrigeration coils were installed by Appellants and worked satisfactorily for a period of time estimated between one and two months thereafter. The testing of said coils was satisfactory and no leaks appeared therein until after the above-mentioned period of time.

Approximately one to two months after the installation and satisfactory testing of the coils, a leak developed in the south coil but caused no damage. Upon the advice of the representative of Appellee, Appellants'

Maintenance Engineer repaired the same and thereafter the coils again operated satisfactorily for a period of time. Some time later, other leaks appeared, one in the north coil and one in the south coil, both of which were repaired by Appellants in the same fashion as the first and the cost of these repairs being paid for by the Appellants but reimbursement therefor was made by Appellee.

On or about December 3rd and 4th, 1955, another leak developed in one of the coils permitting ammonia gas to escape into Swift and Company's storage area, not only into the room in which the coils were located, but also into the main storage room through a door which had a defective lock [Rep. Tr. p. 128, *et seq.*]. It was in the second room into which the gas escaped where the damage occurred resulting in this law suit. Meat and other products were damaged in the sum of $9,175.29.

On or about December 27th, and 28th, 1955, Appellee, through its distributor, the Authorized Supply Company of Arizona, at no cost to the Appellants, replaced said coils with new Bush coils.

Thereafter, Swift and Company filed a law suit in the United States District Court of the District of Arizona naming Appellants herein, Appellee and Authorized Supply Company of Arizona. Appellants called upon Appellee to assume the defense of the said law suit and to pay any damages sustained by Swift and Company, but Appellee refused to do so. In said law suit, Appellants filed a third-party law suit naming as defendants the Appellee herein and the Authorized Supply Company of Arizona, but the Court found therein that it had no jurisdiction over Appellee by reason of

the fact that it was not doing business in Arizona and said law suit was dismissed as to Appellee. Subsequently, Appellants were found liable to Swift and Company for the meat contained in the storage area on the basis of breach of an express warranty; the Authorized Supply Company was found not liable to the Appellants on the ground that Swift and Company had elected to rescind its contract for the sale of goods under the Arizona Sales Act, and having thus elected, had chosen an exclusive remedy for damage limiting the liability to the replacement of the goods sold as against the Authorized Supply Company. On July 29, 1960, Appellants paid in full the judgment of $9,175.29 and paid in course of the defense of the law suit, and three appeals thereof, attorney's fees and costs in the amount of $5,060.12. However, no finding herein was made by the court as to the reasonableness of such attorney's fees and costs.

The appeals mentioned herein are in the cases of: *Authorized Supply Company of Arizona,* a corporation, Appellant, *v. Swift and Company,* a corporation, *et al.*, Appellees, and *Arizona York Refrigeration Company,* a corporation, *et al.*, Appellants *v. Swift and Company,* a corporation, Appellee, 271 F. 2d 242 (1960), Re-Hearing 277 F. 2d 710 (1960), both in the Ninth Circuit.

At the trial of the within action, evidence was offered by Appellants in the form of testimony contained in depositions of: Leland Gideon, Service Manager for Arizona York; Charles Sayers, Foreman in charge of installation of equipment for Appellant; Maurice D. Gerhart, an independent refrigeration serviceman, and Allen Decker, Vice President of Appellee in Charge of

Engineering [under Section 43(b) Rules of Civil Procedure]; Oliver Butler, who was then District Sales Manager of Appellee [under the same section], and Dino Morelli called as an expert witness by Appellants who was by profession a technical consultant and a professor of engineering and design at "Cal-Tech" in Pasadena.

Mr. Gideon testified [Rep. Tr. p. 14 *et seq.*] that he started the refrigeration coils and checked them out, that he went over them to be sure that everything worked, that the proper temperatures in the rooms were maintained, and that he didn't find anything the matter that he couldn't make perform and work; that the coils performed satisfactorily, but later on some leaks appeared. He testified that the ammonia gas was coming out of the electrode tube. He stated that "In a break, the gas would come out definitely through where the electrode is inserted. Not the weld at the head. The leak was not at the weld" [Rep. Tr. p. 35].

Mr. Sayers, Foreman of Installation, stated that he installed the equipment, had no difficulties therewith, it was a routine affair, used testing procedures and the equipment tested out satisfactorily. He found no leaks in the coil during the testing procedures [Rep. Tr. pp. 46, 50, 51, 52, 54, 56].

Mr. Gerhart, a refrigeration serviceman, tested the coil after the leak occurred which caused the damage. He stated "The leak was where the heater element entered the header in the coil," [Rep. Tr. p. 65, lines 9, 10]. He further stated that in his opinion the leak *was caused by the weld* (emphasis added), stating "In my opinion, the weld was not strong enough or ex-

pansion or contraction loosened it in some manner so that it leaked," [Rep. Tr. p. 65, lines 18-21]. Beginning on page 76 of the Reporter's Transcript, Mr. Gerhart testified that he could observe a hole through which the ammonia was leaking, that he could see it with his naked eye and that it was a thin crack, maybe five or six thousands of an inch. The slit could have been caused by a hitting or a jarring of the tube [Rep. Tr. p. 77]. He further stated that the slit in the weld was about one-half an inch long [Rep. Tr. p. 82]. It should be noted at this point that the testimony of Mr. Gerhart is in conflict with that of Mr. Gideon, both of whom were Appellants' witnesses.

Appellants are in error when they state on page 6 of their Opening Brief that Mr. Gerhart gave his opinion that the leak was caused by expansion and contraction of the intertube at its connection with the suction header causing it to leak. That was not the statement of Mr. Gerhart at all; the testimony was as heretofore indicated wherein Mr. Gerhart stated "Well, in my opinion, the weld was not strong enough or expansion and contraction loosened it in some manner so that it leaked," [Rep. Tr. p. 65, lines 18-21].

Also, the statement by Appellants on the same page of their Opening Brief that Mr. Allen Decker, Vice President In Charge of Engineering of Appellee, testified on pages 95 and 96 of the Reporter's Transcript that "Arcing at the cold juncture and the heater element having been placed inside the intertube, could have caused trouble" is in error. There is no such testimony of Mr. Decker.

Dr. Morelli attempted to give an explanation of the cause of the leak, but admitted that he was not familiar

with the particular unit involved in this action, he had never been to the factory, he had never seen a coil manufactured such as the one under consideration [Rep. Tr. pp. 143, 144]; he further stated that the principle of electrically defrosted units "Is as old as Christmas," [Rep. Tr. p. 146, line 6].

At the conclusion of Appellants' case, the trial court granted a dismissal with prejudice under Rule 41(b) of the Federal Rules of Civil Procedure.

III.

APPELLANTS' SPECIFICATION OF ERROR.

Appellants contend that the District Court erred on the following bases:

1. That Appellee is estopped to deny that the refrigeration coils were defective when furnished;

2. Under the doctrine of *res ipsa loquitur*, an inference of negligence was raised;

3. Said inference was not overcome by the Appellee by way of explanation; and

4. The doctrine of *res ipsa loquitur* placed the burden on defendant of at least offering evidence to overcome an inference of negligence.

In the "Designation of Points on Appeal" filed by Appellants herein, Appellants state "That the trial court was in error in finding under the doctrine of equitable indemnity and/or doctrine of *res ipsa loquitur* that the defendant negligently manufactured and/or designed the refrigeration coils installed in Swift and Company's plant in Tucson, Arizona."

IV.
QUESTIONS PRESENTED.

1. Whether Appellants are entitled to equitable indemnity; and if so, under what theory?

   (a) Collateral estoppel;

   (b) Negligence; and if not proved,

2. Whether this case is one in which the doctrine of *res ipsa loquitur* applies in order to establish negligence?

3. Is the action barred by the Statute of Limitations?

4. Does the Court have jurisdiction of the matter?

V.
SUMMARY OF ARGUMENT.

1. Appellants are not entitled to rely upon the theory of collateral estoppel for the reason that this doctrine is confined to issues actually litigated by and between the same parties in a different action, and at the time of judgment in the prior action herein, the parties hereto were not parties to that action.

2. (a) The doctrine of *res ipsa loquitur* does not apply in this case for the liability of the manufacturer or supplier of a chattel for damages for injury to property is limited to the situations where the manufacturer or supplier and the injured plaintiff are in privity. The only exception to this rule is where the manufactured articles are imminently dangerous or where it is reasonably certain if negligently designed or manufactured to place life and limb in peril.

(b) An essential element of the doctrine of *res ipsa loquitur* is absent in that the agency or instrumentality which allegedly caused the damage was not in the control of the Appellee at the time of the damage.

3. The motion under Federal Rules of Civil Procedure, Rule 41(b), gives the right to the defendant to make the motion to dismiss and the trial court can take an unbiased view of all of the evidence, direct and circumstantial, and accord to it the weight it believes it is entitled to receive.

4. The action herein, being one basically couched in negligence, is barred by the statute of limitations, no matter what jurisdiction is applied.

5. The District Court had no jurisdiction because the amount in controversy does not exceed $10,000.00, the original judgment being for less than that amount, and this is not a proper case for the addition of attorney's fees in order to make the jurisdictional amount in diversity cases.

VI.

ARGUMENT.

A. Appellant Is Not Entitled to Equitable Indemnity Under Either Theory of Collateral Estoppel or Negligence.

1. The term "collateral estoppel" is now a term in common usage in the Restatement of Judgments and is often referred to as estoppel by judgment in connection with the doctrine of *res judicata.*

The doctrine of collateral estoppel arises only where there is a second action between the same parties on a different cause of action. The first judgment operates as an estoppel or conclusive adjudication as to such

issues in the second action as were actually litigated and determined in the first action [*Todhunter v. Smith,* 1934, 219 Cal. 690, 695, 28 P. 2d 916. See generally, Restatement Judgments, section 68; *Sutphin v. Speik,* 1940, 15 Cal. 2d 195, 202, 99 P. 2d 652, 101 P. 2d 497).

The effect of a judgment as a collateral estoppel is confined to issues actually litigated, and although the meaning of "issues ligitated" is far from clear in the decisions, it seems perfectly apparent in the instant case that the issue of negligence was not litigated. Appellee here was not a party to the action entitled *"Southern Arizona York Refrigeration Company v. Swift and Company, et al."* before the United States District Court for the District of Arizona, Appellee having been dismissed from said law suit prior to the entry of judgment. In addition, this Honorable court stated in its opinion, at page 244 of 271 Fed. Rep. 2d, as follows:

> "It is clear from the pleadings, the evidence, and the plaintiff's brief filed in this Court that plaintiff seeks recovery of damages against defendants only on the theory of breach of express and implied warranties of a contract for the sale of goods."

Upon rehearing of said case before this Honorable Court, judgment was given to the plaintiff therein upon an express warranty executed by the defendants therein (Appellants here) in which they warranted "all equipment, material and workmanship furnished by the defendants against defects." The Court did find in that action that "Because of defects in one of the Bush coils furnished plaintiff by defendant Arizona York Refrigeration Company, large quantities of ammonia

gas escaped from the refrigeration system in plaintiff's plant and permeated various portions of plaintiff's plant thereby contaminating and damaging large quantities of plaintiff's products stored in the plant". However, there was no finding of any negligence whatsoever.

The doctrine of collateral estoppel does not apply in the instant action for the reason that the same parties were not before the District Court of Arizona. But, even assuming, while not admitting, that the damage to the meat in the Swift and Company's plant was caused by a defect in the coils which were furnished by the Appellee, still there is no finding nor judgment whatsoever as to any negligence or any lack of care whatsoever on the part of Appellee in the manufacture and/or design of the refrigeration coils.

The cases cited by Appellants on page 9 of their Brief are not in point and do not support the argument set forth therein. The case of *Lamb v. Belt Casualty Company,* 3 Cal. App. 2d 624 involved an action for damages for personal injuries as a result of a collision of an automobile with a trailer attached to the automobile truck. The defendant therein had separate policies of insurance, one on the truck and one on the trailer. The case involved the question of excess insurance and did not involve indemnification at all except as between co-insurers, one of which was primary and the other excess. In *Bachman v. Independence Indemnity Company,* 112 Cal. App. 465, 297 Pac. 110, there was involved an action to recover from an insurer the amount of the judgment against the insured where the insurer failed to undertake the defense under the policy. The policy was for public liability indemnity, but again the indemnification arose out of

an insurance policy, a written document, insuring the tort feasor for personal injuries occasioned by him.

The *Santa Cruz Portland Cement Company v. Snow Mountain Water and Power Company,* 96 Cal. App. 615, 274 Pac. 617, involved the question of defendant's liability on a surety bond where a contractor defaulted a job. The surety did not complete the job and the action was against it. The guarantors agreed to become cross-defendants and suffer judgment. The Court held that the defendants could not complain in a subsequent suit by the surety against them as guarantors.

The *West Jersey and S. S. R. Company v. Atlantic City Electric Company,* 107 N. J. Eq. 457, 153 Atl. 254 involved a contract between a railway and an electric company desiring to place wires across the railroad right-of-way. The defendant therein agreed to indemnify the plaintiff for all loss, claims or damages, resulting from the construction. One of the plaintiff's employees was killed and the widow recovered under the Compensation Act against the plaintiff. The court stated that the bill in equity should be dismissed for the reason that the plaintiff had an adequate remedy at law. It commented, however, that indemnification under the contract was available in the legal action and held that the judgment against the plaintiff for workman's compensation in favor of the deceased employee's widow was conclusive as against the defendant. There was no negligence involved; the only issue that was decided in that case was that the plaintiff had an adequate remedy at law.

2. It is obvious that Appellants herein have not established any negligence on the part of the Appellee

and, in fact, admit that if recovery is to be had, and if a reversal is to be received by this Honorable Court, then it must be on the basis that the motion to dismiss was erroneously granted due to the fact that the doctrine of *res ipsa loquitur* applies in this type of action.

B. The Doctrine of Res Ipsa Loquitur Does Not Apply in This Case.

Res ipsa loquitur has been held to be a doctrine involving evidence only and not of substantive law. Consequently, it should be governed by the laws of the forum. In California the doctrine itself merely raises an inference of negligence, and in order to make the doctrine applicable, there must be three conditions present:

1. The accident must be caused by an agency or instrumentality under the exclusive control of the defendant;

2. The accident must be a type which ordinarily does not happen unless someone is negligent;

3. It must not have been due to any voluntary act or contributory fault of the plaintiff.

It must be remembered at all times that this is not the ordinary case of a plaintiff attempting to establish negligence on the part of the defendant, but is an action for equitable indemnity based upon a legal theory of negligence. Appellants assume, (1) That the "Accident" herein was a kind which ordinarily does not occur in the absence of someone's negligence; an assumption that is not warranted; and (2) that there was not any voluntary action or contribution on the part of the plaintiff; again an assumption that is not warranted

in view of the lapse of time between the shipping of the coils from Appellee's place of business to Arizona.

Appellants apparently concede that the coils were not under the control or management of Appellee at the time of the accident and attempt to justify this lack of the first condition by stating "Under some circumstances, it is sufficient if it appears that the injuring agency was in the control of the defendant at the time of the negligent act which caused the injury . . ." (p. 11 of Appellants' Brief). This statement not only presupposes that there is some negligence, but also Appellants fail to point out wherein there is any evidence whatsoever that the condition of the instrumentality which caused the damage was not changed after it left the Appellee's possession.

Appellants rely to a great degree on the case of *Jump v. Ensign-Bickford Company,* 117 Conn. 110, 167 Atl. 90. In this case, the plaintiff was very seriously injured by the premature discharge of dynamite when he was engaged in blasting certain rocks in a mine. The contention was that the premature explosion caused by a quick fuse was due to defects in the fuse which caused the quick burn. The plaintiff brought this against the defendant upon the ground that it was negligent in the manufacture of the fuse and in its inspection before it shipped it from the factory. The jury returned a verdict for the plaintiff which the trial court set aside as against the evidence and an appeal was taken by the plaintiff. The Supreme Court of Errors of Connecticut affirmed the judgment of the trial court.

The plaintiff in the *Jump* case did not stress the application of the doctrine of *res ipsa loquitur,* but did claim that the jury might draw an inference of negli-

gence from the circumstances. The Court stated that the doctrine of *res ipsa loquitur* is a rule of common sense but not a law which dispenses with proof of negligence. It is a convenient formula for saying that a plaintiff may, in some cases, sustain the burden of proving that the defendant was more probably negligent than not by showing how the accident occurred without offering any evidence to show why it occurred (quoting from *Stebel v. Connecticut Co.,* 90 Conn. 24, 25; 96 Atl. 171, 172).

This case follows those particular cases dealing with *manufacturer's liability* where the instrumentality causing the injury is *imminently dangerous* within the rule fixing manufacturer's liability. In the *Jump* case the trial court in its memorandum setting aside the verdict regard the evidence as establishing "an indisputable physical fact" which did not permit a reasonable conclusion of negligence on the defendant's part. In the instant case, it is obvious that from and after the time of shipping of the coils from Connecticut to Tucson, Arizona, Appellee had no control over the transportation, storing, installation, operation, or maintenance of the coils, but that the coils were in the control of the Appellants and/or Swift and Company and/or a transportation company from the time of leaving Connecticut until the installation in Tucson, Arizona. In view of the fact that refrigeration coils are not inherently dangerous, and that a long period of time ensued wherein said coils were not in the control of Appellee, it is obvious that the "control" factor in the doctrine of *res ipsa loquitur* is missing and cannot be supplied by relying upon a case or cases which involve inherently dangerous articles which can be dangerous to life and limb.

Appellants state on page 13 of their Brief, that "The defect, when discovered, was inside the coil." This is not the true statement of fact. The evidence presented by Appellants at the time of the trial created a conflict in the evidence between its own witnesses; one stating that in his opinion the defect was inside the coil somewhere in one of the tubes, and the other stated that upon testing the coil after the escape of the ammonia gas, he found that gas was escaping from a slit or hole in the weld which in effect is outside the tubes. A slit or a hole in the weld could have been caused by an outside force, especially since there has been no control by the Appellee from the time of shipment from Connecticut to Arizona. Thus, there is no certainty as to the cause, actually, of the damage to the meat and no certainty as to what the defect was in the coil, if any. The need for the precaution of the condition of control in the doctrine of *res ipsa loquitur* is obviously present in this case and cannot be obviated.

C. Liability of a Manufacturer or Supplier of a Chattel for Damages for Injury to Property Is Limited to the Situation Where the Manufacturer or Supplier and the Injured Plaintiff Are in Privity.

1. Negligence on the part of the manufacturer cannot be inferred under the *res ipsa loquitur* rule where the manufacture and the marketing of the merchandise is not imminently, intrinsically or essentially dangerous in and of itself or when applied to its intended use (see the American Law Institute's Restatement Law of Torts, Vol. 2, § 395).

Traditionally, privity has been viewed as a prerequisite to recovery in a negligence action growing out of

product-caused injury. Hence, in a negligence action against a producer or seller of industrial equipment and similar products, recovery will be denied if privity does not exist as between the injured person and the defendant, unless the jurisdiction is one in which the privity requirement has been repudiated in toto, or on which an exception to the requirement has been drawn with respect to a particular classification of cases which comprehend such an injury-causing product. Whatever ground is alleged in an action for injury caused by a product, the establishment of certain facts is indispensable to recovery. Thus, it must be shown that the product in question was actually defective or harmful in some way; the parties sought to be held liable for the injury must be shown to have actually manufactured or sold it, or must be identified with the harm-causing product, and a causal relation must be shown to exist between the defendant manufacturer's act or omission and the injury which is sought to hold him liable. The defect must be shown to have existed at the time the product left the defendant manufacturer or seller. *O'Donnell v. Geneva Metal Wheel Co.,* 1950, Ca. App. 6th Ohio, 183 F. 2d 733, rehearing denied 190 F. 2d 59, certiorari denied, 341 U. S. 903, 95 L. ed. 1342; see also *Darling v. Caterpiller Tractor Co.,* 1959, 171 Cal. App. 2d 713.

In the case of *Tayer v. York Ice Machinery Corp.,* 1938, 342 Mo. 912, 119 S. W. 2d 240, 117 A. L. R. 1414, an action for death was brought as a consequence of the explosion of ammonia fumes which escaped from a crack in the manifold on an ammonia ammonia compressor sold to decedent's employer by defendant manufacturer. The Court held the defend-

ant not liable under the *res ipsa loquitur* rule pointing out that the rule was a qualification of rather than an exception to the general rule of evidence that negligence must be affirmatively proved in that it relates to the mode rather than the burden of establishing negligence; that the rule springs not from the fact of injury, but from the facts attending the occurrence.

The Court said that the negligence on the part of the defendant manufacturer could not be inferred under the *res ipsa loquitur* rule in view of the fact that it was shown that the machine had passed into the possession and control of the decedent's employer and had been continuously operated for a period of time during which it was subjected to deterioration incident to operation. Moreover, the evidence was said to show no actionable negligence in the manufacture, inspection or test of the manifold in view of the testimony that the crack in the manifold was caused by rapid changes in temperature and flaws therein; that the manufacturer tested the compressor after installation which failed to show any leaks; that the manifold was continuously operated by the purchaser for a period of time free from control of the defendant during which time it was subject to the flow of and pressure from ammonia and to rapid changes in temperature and to "knocks" occasioned by liquid ammonia which immediately would have an effect on the manifold casting.

In another action brought to recover for injury sustained by an employee of the purchaser of an air compressor, the Court in *Fedor v. Albert,* 110 N. J. L. 493, 166 Atl. 191 held that the doctrine of *res ipsa loquitur* was inapplicable. The control of the defendant requisite to the application of the doctrine was absent, in

this reported case in which it appeared, that the compressor tank burst two months after it had been delivered.

2. Applicability of the Rule and Cases Involving Injury to Property.

The rule of immateriality of privity where the part is imminently dangerous is applicable to products which have other parts to be incorporated in the product of one other than the defendant manufacturer or seller if the parts are so negligently made as to render the products in which they are incorporated unreasonably dangerous for use. In other words, the privity requirement in actions of this type between the manufacturer and the injured party can be obviated if the product is imminently dangerous to life or limb.

The great weight of authority views the "imminently" dangerous product exception to the requirement of privity as applicable only in cases involving injury to the person and not in cases involving property damage. *Russell v. Sessions Clock Co.,* 1955, 19 Conn. Supp. 425, 116 A. 2d 575. In the case of *Jump v. Ensign-Bickford Co.,* 1933, 117 Conn. 110, 167 Atl. 90, the Court said that imminently dangerous had reference to an article which is of such a nature that danger in its use is imminent; that is, "Its use for the purpose for which it is intended is fraught with immediate peril carries a threat of serious impending danger." See also *Larramendy v. Myres,* 1954, 126 Cal. App. 2d 636, 272 P. 2d 824. See *Sheward v. Virtue,* 20 Cal. 2d 410. In that case, the Court said that it is universally recognized that a manufacturer or seller of an article which is inherently and imminently dangerous to human life

or health, or which although not dangerous in itself becomes so when applied to its intended use in the usual and customary manner, is liable to any person whether the purchaser or third person who, without fault on his part, sustains injury which is the natural and proximate result of negligence in the manufacture or sale of the article. If the injury might have been reasonably anticipated, liability does not rest on the ground of warranty, nor does liability depend on privity of contracts, but rather on a breach of public duty owing to all persons into whose hands the article may lawfully come and by whom it may be used and whose lives may be endangered thereby to exercise care and caution commensurate with the peril and not to expose human life to danger by carelessness or negligence.

One of the latest enunciations of the law in California is found in *Varas v. Barco Manufacturing Company,* 205 Cal. App. 2d 246. This was an action in negligence against a manufacturer and the lessor of a gasoline-operated earth compactor for injuries allegedly occurring when the machine spread gasoline on the body of the operator. The gasoline was ignited by a spark from the machine and the plaintiff was injured.

In connection with the consideration of the legal duty of each defendant in respect to the machine, the Court stated on page 257 "The manufacturer of a chattel owes a duty of care toward a user, although there is no privity of contract between them, where the article is inherently dangerous or where it is reasonably certain if negligently designed or manufactured, to place life and limb in peril." *Darling v. Caterpiller Tractor Co.,* 171 Cal. App. 2d 713, 720, 341 P. 2d 23, see 2 Harper & James, The Law of Torts, §28.3-28.11, 28.14.

The essence of Appellants attack against Appellee is grounded upon a product-caused liability cause of action and based upon negligence. The Appellants and Appellee were not in privity. Therefore, under the overwhelming state of the law regarding product liability cases, Appellant cannot prevail because the article manufactured and/or designed by Appellee in this instance was not one which was inherently dangerous, nor was it one which was likely to cause danger to life or limb.

D. In a Non-Jury Case the Defendant May Move to Dismiss at the Close of Plaintiff's Presentation Because "Upon the Facts and the Law, the Plaintiff Has No Right to Relief."

Federal Rules of Civil Procedure, Rule 41(b) gives the right to the defendant to make a motion to dismiss which constitutes a mid-trial test of the sufficiency of plaintiff's cause of action. It serves a function comparable to that of a motion for directed verdict in a jury case or a motion for non-suit under California Code of Civil Procedure Section 581(c).

If the above motion had been a motion for a directed verdict, Appellants would perhaps be correct in their allegation on page 16 of their Brief that the Court must assume that all evidence received in favor of the plaintiff relative to the issues is true and all inferences and doubtful questions must be construed most favorable to the plaintiff, for in a directed verdict situation, the Court can grant the motion only if the evidence considered in the light most favorable to the plaintiff is insufficient as a matter to justify a verdict. *Courtner v. Custer County Bank* (9th Circuit 1952), 198 F. 2d 828. This is not such a case. On the other

hand, after a motion to dismiss on a non-jury case, the court is not bound to review the evidence in the light most favorable to the plaintiff with all attendant favorable assumptions. Instead, the judge should take an unbiased view of all of the evidence, direct and circumstantial, and accord it the weight he believes it entitled to receive. *Huber v. American President Lines* (2nd Circuit 1957), 240 F. 2d 778; *Allred v. Sasser* (7th Circuit 1948), 170 F. 2d 233. The granting of a motion to dismiss under Rule 41(b) results in adjudication on the merits, a dismissal with prejudice unless the court otherwise specifies.

E. The Within Action Is Barred by the Statute of Limitations.

Essentially speaking, the cause of action brought by the plaintiff herein, even though called "indemnification" is one for negligence. The cause of action is couched in negligence, and as such, the survival of such actions, generally regarded as substantive, is treated as procedural in California; and in this instance, procedural matters are generally governed by the law of the forum. *Hamlet v. Hook* (1951), 106 Cal. App. 2d 791, 794, 236 P. 2d 196. While statutes of limitations and similar time provisions raise exceedingly difficult problems in the field of conflict of laws, the starting point is the notion that the statute is procedural and therefore governed by the law of the forum. Hence, the action is barred if the limitation period of the forum has run even though the action might still be maintainable elsewhere (Restatement Conflict of Laws §603; *Ohio v. Porter,* 1942, 21 Cal. 2d 45, 47, 129 P. 2d 691; *Sullivan v. Shannon,* 1938, 25 Cal. App. 2d 422,

425; *Littlepage v. Morck,* 1932, 120 Cal. App. 88, 7 P. 2d 716).

The statute of limitations in California on damages for negligence for property damage is two years. The Code of Civil Procedure, Section 339 (1) states:

> "Within two years. An action upon a contract, obligation, or liability not founded upon an instrument of writing, other than that mentioned in subdivision 2 of Section 337 of this code . . ." Also, Code of Civil Procedure, § 361 states: "The effective limitation of laws of other states. When a cause of action has arisen in another state, or in a foreign country, and by the laws thereof, an action thereon cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state, except in favor of one who has been a citizen of this state, and who has held the cause of action from the time it accrued."

Despite the question of the conflict of laws and to which statute is applicable, *i.e.* that of California, of Arizona or of Connecticut, the situation and result is the same.

The statute of limitations in the State of Arizona on actions for injury to real or personal property is two years. *Arizona Revised Statutes 1956, §12-522, 524.* Also, in the State of Connecticut the statute of limitations for injuries to real or personal property caused by negligence is one year. *Connecticut General Statutes, Revision of 1958, §52-584.*

It, therefore, appears that under the law of any state in which this action might be determined, the statute of limitations for actions couched in negligence for damage to personal property is not to exceed two years and has long since passed.

The affirmative defense and contention of Appellee with this regard should be sustained.

F. The Court Has No Jurisdiction.

Appellee contends that the District Court of the United States had no jurisdiction in this matter which is based upon diversity of citizenship on the ground that the matter in controversy does not exceed the sum of $10,000.00, exclusive of interest and costs.

The amount recovered by Swift and Company from the Appellants herein was less than $10,000.00. Appellants contend that attorney's fees paid by them in the prosecution of the appeals in the former action, as well as the defense to the trial of the action, should be added to their judgment, and, as authority, rely in general upon the equitable law of indemnity. However, in matters of this kind where the amount and the jurisdiction of the court is concerned, the only cases relating to this question stem from indemnifications, guarantees or suretyships in writing where the defendant in the prior action was forced to pay attorney's fees by reason of some written agreement or statute of the law of the forum.

It follows then that the actual amount in controversy here is the amount of the judgment obtained by Swift and Company against the Appellants in the District Court for the District of Arizona which is less than $10,000.00.

Attorney's fees may be included in computing the jurisdictional amount where they are provided for as part of the damages in the contracts sued upon and where the fees are allowable by state statute in specified actions (*Springstead v. Crawfordsville State Bank* (1913), 231 U. S. 541; *Missouri State Life Insurance Co. v. Jones* (1933), 290 U. S. 199).

There is no contract providing for the payment of attorney's fees, nor is there any state statute imposing such an obligation. Therefore, the true amount in controversy is the sum of $9,175.29, less than the statutory amount required for jurisdiction in diversity cases (28 U. S. C. 1331, 1332(a)).

CONCLUSION.

As heretofore stated, Appellee contends, and it has been proved, that Appellee had no control over the transportation, storing, installation, operation or maintenance of the refrigeration coils; but contrary speaking, said coils were in the control of the Appellants and/or Swift and Company ever since they were shipped from Connecticut to Arizona. Further, Appellee contends that the contract for the purchase of the said coils was rescinded by Swift and Company, the coils returned and everything already paid by the Appellants has been recovered by Appellants. Inasmuch as the purportedly defective coils were replaced by the Appellee and accepted by the Appellants, the terms of the sale of the said coils from Appellants to Swift and Company contained an express warranty which limited the Appellants remedy to the repair or replacement of the same, and replacement has been made. Appellants have not shown any negligence whatsoever in either the

manufacture or design of the coils and have failed to prove that even if there were negligence, that the damage to the meat was the proximate cause of the defect. In addition, because of the fact that the cause of action grounds in negligence, and the fact that it occurred more than four years prior to the bringing of this action, is a good indication that the statute of limitations should apply.

Were it not for the fact that Appellant expended great sums in defending a lawsuit and two appeals, the amount in controversy would be below the jurisdictional amount. Attorney's fees should not be added to the amount of damages to invoke the jurisdiction of this court.

It is respectfully submitted that the District Court's order dismissing the action should be affirmed.

TREMAINE & SHENK,
By JOHN W. SHENK,
Attorneys for Appellee.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

JOHN W. SHENK

No. 18684

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SOUTHERN ARIZONA YORK REFRIGERATION COMPANY, *et al.*,

Appellants,

vs.

THE BUSH MANUFACTURING CO., *et al.*,

Appellee.

On Appeal From the District Court of the United States Southern District of California, Central Division.

APPELLANTS' REPLY BRIEF.

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TABLE OF AUTHORITIES CITED

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Appellee.

APPELLANTS' REPLY BRIEF.

I.
STATEMENT OF FACTS.

Appellants are forced to disagree with appellee concerning certain matters appellee erroneously states as facts.

1. Witness Gerhardt testified that "In my opinion the weld was not strong enough, or expansion and contraction loosened it in some manner so that it leaked". [Tr. p. 65, lines 17-20.] The weld spoken of was made by appellee and witness Gerhardt further stated that "If a hammer would hit it, it would have bent the tube" and then, in answer to the question "You don't remember seeing any bent tubes?", the answer was "No". Defendant's Exhibits B, C, D, F and G also show no bent tubes in the defective coil.

2. Appellee is in error in stating that the testimony of witness Alan Decker, appellee's vice president in charge of engineering, did not make the statement that arcing at the cold juncture of the heater element inside the innertube could have caused trouble". Said statement appears almost verbatim on page 96, lines 9 to 17 of Transcript.

3. Witness Morelli agreed with the statement made by appellee that "Essentially, it is your testimony, Doctor, that there could be a crack or slit in a well (meaning the innertube in which the heater element was housed) due to a differential in the coefficient of expansion of the inner and outer tubes". Answer "Yes, sir, it could develop."

4. This honorable court found that the trial court in the case of *Authorized Supply Company of Arizona, a corp., appellant v. Swift & Company, a corp., et al., appellees,* and *Arizona York Refrigeration Company, a corp., et al., appellants v. Swift & Company, a corp., appellee,* 271 F. 2d 242 (1960) Ninth Circuit, rehearing 277 F. 2d 710 (1960) Ninth Circuit, at p. 712 found as a fact that "The sole cause of damage was the manufacturer's defect in one of the refrigeration coils". Also, the trial court found that damages sustained in the amount of $9,175.29 were due as a proximate result of the defective refrigeration coil. Appellee hints in its statement of facts that gas escaping as a result of a defective lock might have been the proximate cause of the damages sustained by Swift & Company and obtains this fact from the transcript of the record of the previous trial. This was not found to be a fact by the trial court.

II.
SUMMARY OF ARGUMENT.

1. Appellants can rely on the theory of collateral estoppel and *res judicata* to establish the fact of the defective coils, proximate cause of damage and the amount of property damage.

These issues were decided at the time of the first trial and appellee having been offered the opportunity to defend and having refused to do so, is estopped to deny them.

2. Appellants' cause of action in this case is based on the common law doctrine of equitable indemnity. This theory is embodied in the statement "One compelled to pay damages on account of a negligent or tortious act of another, has a right of action against the latter for indemnity".

3. The doctrine of *res ipsa loquitur* applies in this case. It applies whether the injury is for property damage or for injury to the person. The doctrine is not limited to situations in which there is privity between the supplier of a chattel and other parties, nor is it limited to articles manufactured which are of an inherently dangerous nature.

4. The statute of limitations applicable to this case is governed by Section 339(1) of the California Code of Civil Procedure and the present action was not outlawed prior to its commencement.

5. The court has jurisdiction in this case in that the damages to property by stipulation were $9,175.29 and appellant has paid $5,060.70 in expense and legal fees and both the damages and expenses are includable as compensable damages in an action for equitable indemnity.

III.
ARGUMENT.

1. Appellee's Attempts to Differentiate All the Cases Cited in Appellants' Opening Brief Having to Do With Collateral Estoppel on the Basis of Citing Special Circumstance Tending to Prove That Each Case Does Not Apply in the Instant Case, Are Completely Ineffective.

All cases quoted previously are in point. *Lamb v. Belt Casualty Company,* 3 Cal. App. 624, 40 P. 2d 311; *Bachman v. Independence Indemnity Company,* 112 Cal. App. 465, 297 Pac. 110; *Santa Cruz Portland Cement Company v. Snow Mountain Water and Power Company,* 96 Cal. App. 615, 274 Pac. 617; *West Jersey and SSR Company v. Atlantic City Electric Company,* 107 New Jersey Equity 457, 153 Atl. 254. All have to do with the factual situation wherein and whereby defendant in the action was requested to defend, refused to do so and then on an indemnity action, collateral estoppel was invoked to prevent the denial of facts determined in the previous litigation. The parties were not the same and they were not in privity in the second litigation in each instance.

The theory, of course, was and is simply that the defendant having been afforded ample opportunity in court to defend himself and having refused to do so, cannot at a later date deny facts determined and issues litigated at the time of the original action.

As a matter of fact, the theory of collateral estoppel and *res judicata* in connection with this kind of action

goes even further, for in the case of *San Francisco Unified School District v. California Building Maintenance Company* (1958), 162 Cal. App. 2d 434, 328 P. 2d 785, the court decided that determination in a prior action by the employee of a maintenance company against the school district that School District failed to furnish employee safe place in which to work, was *res judicata* in action by the School District against the maintenance company seeking indemnity under implied contract of indemnity for damages that it was compelled to pay prior to judgment, although the maintenance company was not a party to the prior action and had not been called upon to defend the original action. The court stated:

> "Something should also be said about the doctrine of res judicata and the doctrine of collateral estoppel. Are the issues determined in the action by Dubay against the School District, res judicata in this action by the School District against the maintenance company? We think they are, that is, whatever was determined in the prior action is res judicata in the instant case although the maintenance company was not a party to the action."

Also in line with this case, see *Los Angeles County v. Cox Brothers Construction Company* (1961), 195 Cal. App. 2d 836, 16 Cal. Rptr. 250, wherein *res judicata* was invoked against Cox Brothers Construction Company, even though they were not called upon to defend.

2. **As to Equitable Indemnity, the Case of Alisal Sanitary District v. Kennedy, 180 Cal. App. 2d 89 (1960), 4 Cal. Rptr. 379, the Elements of the Suit Are Explained in Great Detail, When It Was Held That the Alisal Sanitary District Had a Right of Indemnity Over and Against Kennedy on the Basis of His Negligence in Bringing About Damages Elected From the City Through the Law of Nuisance and Inverse Condemnation.**

In the state of the citus of the injury, Arizona, there are at least three cases recognizing the doctrine. In the case of the *Busy Bee Cafee v. Ferrell,* 82 Ariz. 192, 310 P. 2d 817, the Busy Bee Cafee, a partnership, in an original action was held to be liable for personal injury suffered when Ferrell negligently left open a trap door. The partnership recovered from Ferrell on a suit for equitable indemnity and the court stated

> "Where one is liable by construction of law on account of some omission for protection or care, he has the right to be indemnified by the wrongdoer."

In the case of *Krause v. Wilbur Ellis Company*, 77 Ariz. 359, 272 P. 2d 352, Krause purchased some insecticide from Wilbur Ellis Company, sprayed his fields and in so doing, the insecticide caused damages to adjacent crops. Krause was held liable under an interpretation of Arizona law and sued the insecticide manufacturer on the ground of an implied contract for indemnity and by reason of that fact, the court held that the insecticide manufacturer through its negligence was liable to Krause.

Also, see Corpus Juris Secundum under the title: *Indemnity For Another's Wrong,* where it is stated

> "One compelled to pay damages on account of a negligent or tortious act of another, has a right of action against the latter for indemnity. It is a well recognized rule that an implied contract of indemnity arises in favor of a person who, without any fault on his part is exposed to liability and is compelled to pay damages on account of the negligent or tortious act of another, the former having the right of action against the latter for indemnity, provided that they are not joint tort feasors such as to prevent recovery as discussed infra Section 27. This right of indemnity is based on the principle that everyone is responsible for his own negligence and if another has been compelled by the judgment of a court having jurisdiction to pay the damages which ought to have been paid by the wrongdoer, they may be recovered from him. It exists independently of statute and whether or not contractual relations exist between the parties and whether or not the negligent person owed the other person a special or particular legal duty not to be negligent."

If ever a case fell precisely into that formula and the elements named there, it would seem to be the present one.

3. Res Ipsa Loquitur in This Factual Situation Raises an Inference That the Defective Coils Which Were Found as a Fact by the Trial Court at the Previous Trial to Be Defective Were Negligently Designed or Manufactured.

The unique argument contained on page 13 of appellee's brief that appellants assume "That the 'Accident' herein was a kind which ordinarily does not occur in the absence of someone's negligence; an assumption that is not warranted;" would seem to be somewhat unusual, to say the least.

Is appellee contending that it ordinarily does furnish defective coils to its customers? Or that its coils ordinarily develope defects after installation?

These refrigeration coils were furnished appellants and installed in Swift & Company's plant by appellant. There is absolutely no evidence whatsoever of any negligent acts performed by appellants or for that matter, by Swift & Company, but there is an abundance of evidence to the effect that no "outside force" of any kind altered these specific coils at any time before any defect occurred in the coils, and each of the coils became defective exactly in the same way that the previous coil had become defective.

The defective coil which proximately caused the damages had been installed for a period of three months before it became defective and appellee was informed by appellants of each of the defects in each of the coils as the defect occurred. They were all repaired in exactly the same manner at the instance and instruction of appellee's agent, servant and employee who knew exactly how to remedy the situation and gave instructions how to do so.

Appellants were reimbursed for the corrective measures taken at the instruction of appellee. Appellee, by its conduct, in not only paying for the welding that was necessary to correct on a temporary basis the defects in the coils, but in replacing them, would logically seem to have performed an act of admission against interest which could be interpreted as knowledge on its part that it was responsible for the defects, either in the manufacturing or design.

Nothing in the testimony of any of the witnesses and nothing that appellee has brought out in its argument can change these facts.

The argument that appellant has relied upon case theory that involved only personal injury and then only due to an inherently dangerous chattel, is erroneous.

While it is true that a majority of the cases applying the doctrine of *res ipsa loquitur* for products liability involve personal injury and in addition, any defective condition in a product can or could cause it to become dangerous to a person, the cases certainly do not exclusively involve personal injury, and many of them have nothing to do with chattels which are inherently dangerous.

Thus, although in the cases of *Baker v. B. F. Goodrich,* 115 Cal. App. 2d 221, 252 P. 2d 24 (explosion of a new tire being mounted and inflated by plaintiff); *Rohar v. Osborne,* 33 Cal. App. 2d 345, 282 P. 2d 125 (explosion of weed burner rented to plaintiff's employer); *Maercherlin v. Sealy Mattress,* 145 Cal. App. 2d 275, 302 P. 2d 331 (mattress spring working through); *Dunn v. Vogel Chevrolet,* 168 Cal. App. 2d 117, 335 P. 2d 492 (brake failure due to defective brake hose); *Reynolds v. Natural Gas Equipment Company,*

184 Cal. App. 2d 724, 7 Cal. Rptr. 879 (explosion of industrial gas burner); *Woodworkers Tools v. Burn,* 197 F. 2d 667 (disintegration of panel razor head on shaper while being used by plaintiff), all invoked the doctrine of *res ipsa loquitur* and all involved personal injury at the time when the defendant did not have control of the product causing the injury.

But, in none of these cases was the fact mentioned that the product had to be an inherently dangerous one before the doctrine could be applied or liability could be imposed.

In addition thereto, the cases are not confined exclusively to damages for personal injury. In the case of *Wiedert v. Monahan Post Company,* 243 Iowa 643, 51 N. W. 2d 400, a water heater had been cleaned by defendant plumber and a leak developed one to two hours later, damaging merchandise and the doctrine was applied. In the case of *Plunket v. United Electric Service,* 214 La. 145, 36 So. 2d 704, the doctrine was applied on fire damage to a house which was caused by a heater unit installed two days previously. Again, in *Winkle v. Lees Plumbing and Heating Company,* 257 Minn. 14, 99 N. W. 2d 779, property damage resulted from the installation of a wash bowl, installed in April of 1955, and the damage occurred in December of the same year. In the case of *Day v. National U. S. Radiator* (La. 1959), 117 So. 2d 104, a heater exploded during the construction of a building and *res ipsa loquitur* was applied against the architect.

In that case, the court stated

> "Control by the defendant of the offending device appears no longer to be an absolute requirement for the application of the res ipsa loquitur

> doctrine, provided that other factors usually required are present, chiefly absence of knowledge on the part of the injured party concerning the cause of the incident and superior ability of the defendant to explain the occurrence."

Applying that language to this factual situation, most assuredly appellee was in a superior position to determine and explain why these coils became defective in the manner and way in which they did, and appellant most assuredly is unable to explain the defect.

In the case of *Ryan v. Zweck Wollenberg* (Wis. 1960), 64 N. W. 2d 226, plaintiff suffered injuries from a refrigerator that was three years old, a unit consisting of a motor and compressor had been sealed within a metal enclosure and had never been opened or tampered with by anyone from the time the refrigerator was removed from its original shipping crate in which the refrigerator was shipped by the manufacturer, to the time when the user of the refrigerator door was injured by an electric shock when she touched the handle of the refrigerator, the court found that even though three years had elapsed from the time the refrigerator passed out of the possession of the manufacturer, *res ipsa loquitur* was applicable.

It can thus be seen that neither the necessity of exclusive control by defendant at time of injury, nor an inherently dangerous product is necessary to the theory propounded by appellants in this case.

4. The Statute of Limitations in the Present Case Is Governed by Section 339(1) of the California Code of Civil Procedure in That It Is an "Action Upon a Contract, Obligation or Liability Not Founded Upon an Instrument in Writing".

Section 339(1) of the California Code of Civil Procedure allows a period of two years from the date of injury for the filing of a law suit.

The obligation or liability of the appellee to appellants actually occurred in the present case at the moment that appellants paid the judgment imposed upon it by law, the date said judgment was paid off was July 26, 1960. This action was originally filed March 15, 1961, within one year of the date that the original judgment was paid off. In the case of *De La Flores v. Yandle* (1959), 171 Cal. App. 2d 59, 340 P. 2d 52, the owner of a truck employed the plaintiff to repair the axle, the plaintiff then sublet the work to the defendant, the defendant negligently did the work with the result that the truck ran off the highway and struck an automobile operated by deceased. Plaintiff and the owner of the truck settled the suit with representatives of the deceased for $45,000.00, the plaintiff then brought suit on the grounds of equitable indemnity against Yandle, who had negligently repaired the axle and was held by the court in reversing the suspension of a demurrer without leave to amend that plaintiff stated a cause of action. It was also decided by the court that the right to indemnity did not arise until the compromise had been perfected and

appellants had obtained the release of liable parties. According to the complaint, that occurred May 6, 1955, and the action was begun April 9, 1956, less than a year after the accrual of the cause of action. The action was therefore not barred by the statute of limitations pleaded.

In 42 Corpus Juris Secundum at p. 603, it is stated

> "The right to sue for indemnity accrues when a payment has been legally made for indemnity. As a general rule, the right to sue for damages resulting from the negligent misfeasance or malfeasance against another, accrues only when payment has been legally made by the indemnitee. . . . While to be entitled to indemnity, an actual legal liability must have been sustained, the indemnitee may adjust and pay the claim without awaiting the result of the suit, provided the amount paid is reasonable and in good faith."

5. **The Present Court Has Jurisdiction Because an Action for Indemnity Includes Not Only the Amount of Damages Sustained by the Indemnitee, but All Reasonable Expenses He Has Incurred in Defending Himself From the Original Action.**

Thus, in the case of *Commercial Standard Insurance Company v. Cleveland,* 86 Ariz. 288, 345 P. 2d 210, it is stated that

> "If the indemnitor has knowledge of the proceedings and refuses to defend and the indemnitee incurs legal expenses, such expenses are chargeable to the indemnitor."

Additionally, in the cases of *Alisal Sanitary District v. Kennedy,* 180 Cal. App. 2d 289 (1960), 14 Cal. Rptr. 379, includable in the complaint were not only damages, but legal expenses involved in defense. Such was also the case in *Pierce v. Turner,* 205 Cal. App. 2d 264, 23 Cal. Rptr. 115.

It can thus be seen that appellants' cause of action comes within the jurisdiction of this court for this reason.

Conclusion.

Trial court should be reversed and judgment entered on behalf of appellant.

Respectfully submitted,

JOHN W. MORAN,
Attorney for Apepllants.

Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN W. MORAN.